

APPENDIX

Supreme Court, U. S.

F I L E D

DEC 2 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

76-5382

WILLIE JASPER DARDEN,

Petitioner

—v.—

STATE OF FLORIDA,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF FLORIDA

PETITION FOR CERTIORARI FILED SEPTEMBER 15, 1976
CERTIORARI GRANTED NOVEMBER 1, 1976

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INDEX

	Page
Chronology	1
Indictment	3
Transcript of Preliminary Hearing	6
Trial Transcript	13
Jury Selection	13
Defense Motion to Limit Voir Dire	13
Trial Court's Instructions to Jury on Sentencing Responsibility	15
Voir Dire Concerning Juror Views on Death Penalty	17

Trial Testimony—Continued	Page
Testimony of State's Witnesses	24
HELEN TURMAN	24
PHILLIP ARNOLD	65
DON NEIL	86
Motion to Suppress	92
Testimony of State's Witnesses	96
PHILLIP ARNOLD	96
Closing Arguments of Counsel	103
Court's Preargument Instructions to Jury	103
MR. MALONEY (Defense)	105
MR. WHITE (State)	116
MR. McDANIEL (State)	121
MR. GOODWILL (Defense)	138
Judgment and Sentence	156
Opinion of the Supreme Court of Florida	158
Order of the Supreme Court of the United States Granting Motion for Leave to Proceed <i>in forma pauperis</i> and Grant- ing Petition for Writ of Certiorari	173

CHRONOLOGY

- September 11, 1973: The witness Phillip Arnold shown photographs of petitioner and others.
- September 13, 1973: Preliminary hearing held in County Court of Polk County. Petitioner bound over for arraignment on first degree murder charges after being identified by Helen Turman.
- September 26, 1973: Indictment returned by Polk County, Florida, Grand Jury charging, *inter alia*, that petitioner "unlawfully and from a premeditated design to effect the death of James C. Turman, did inflict mortal wounds upon the said James C. Turman, by shooting him with a pistol . . . from which mortal wounds the said James C. Turman did languish and die" in violation of Florida Statute 782.04(1) [which defines first degree murder].
- January 15, 1974: Selection of petitioner's trial jury began.
- January 16, 1974: Presentation of state's evidence began.
- January 18, 1974: Presentation of defendant's evidence began.
- January 19, 1974: Counsel for both sides made closing arguments to the jury.
- January 19, 1974: Jury returned verdict finding petitioner guilty of first degree murder and of other offenses arising from the same events.
- January 19, 1974: Jury returned advisory sentencing verdict recommending imposition of death penalty.
- January 23, 1974: Trial court announced its judgment, sentencing petitioner to death.

February 18, 1976: Supreme Court of Florida announced its opinion affirming petitioner's conviction and the imposition of the death sentence, with two justices dissenting.

March 1, 1976: Petitioner moved for rehearing before the Florida Supreme Court.

April 19, 1976: Supreme Court of Florida denied petition for rehearing.

May 14, 1976: Mr. Justice Powell signed order staying petitioner's execution pending disposition of a timely application for a writ of *certiorari*.

July 8, 1976: Mr. Justice Powell signed order extending petitioner's time to file a petition for a writ of *certiorari* to and including September 16, 1976.

September 15, 1976: Petition for *certiorari* filed, together with motion for leave to proceed *in forma pauperis*.

November 1, 1976: Motion for leave to proceed *in forma pauperis* and petition for writ of *certiorari* granted.

[I; 21-23]*

[INDICTMENT]

IN THE CIRCUIT COURT, For The Tenth Judicial Circuit of Florida, Polk County, Spring Term, in the year of our Lord one thousand nine hundred and seventy three.

THE STATE OF FLORIDA

v.

WILLIE JASPER DARDEN

Indictment for

Count I—First Degree Murder
Capital Felony
78204 (1)

Count II—Robbery
Felony
813.011

Count III—Assault to Commit
Murder in First Degree
784.06

In the Name and by the Authority of the State of Florida:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of Polk upon their oath do present that

* The record in the Florida Supreme Court consists of eight numbered volumes of the Transcript of Record. (Volume I contains pages 1-200; Volume II, pages 201-370; Volume III, pages 1-195; Volume IV, pages 196-307; Volume V, pages 307a-424; Volume VI, pages 426-567; Volume VII, pages 568-712; and Volume VIII, pages 713-919.) In addition, there is a separate, unnumbered "Supplement to transcript of record," a separate "master index," and a separate volume containing the transcript of a hearing held on a motion to suppress certain evidence. References in the appendix to the Transcript of Record appear in brackets and include both volume and page numbers.

Willie Jasper Darden of the County of Polk and State of Florida, on the 8th day of September in the year of our Lord one thousand nine hundred and seventy three in the County and State aforesaid unlawfully and from a premeditated design to effect the death of James C. Turman, did inflict mortal wounds upon the said James C. Turman, by shooting him with a pistol, a further description of which is to the Grand Jurors unknown, from which mortal wounds the said James C. Turman did languish and die on the 8th day of September, 1973, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT II

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of Polk upon their oath do present that Willie Jasper Darden of the County of Polk and State of Florida, on the 8th day of September, 1973, in the County and State aforesaid unlawfully by force, violence or assault or putting in fear did feloniously rob, steal and take away from the person or custody of Helen Turman, money in currency and coin of the United States of America, current of the value of one dollar (\$1.00) or more, the property of Carl's Furniture and Refinishing, with intent permanently to deprive the owner of his property and the said Helen Turman was then and there entitled to the possession of the said one dollar (\$1.00) or more, as against the said defendant, Willie Jasper Darden, and said Willie Jasper Darden, was not then and there the owner or entitled to possession of said one dollar (\$1.00) or more, in violation of Section 813.011, Florida Statutes.

COUNT III

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of Polk upon their oath do present that Willie Jasper Darden of the County of Polk and State

of Florida, on the 8th day of September, 1973, in the County and State aforesaid unlawfully and feloniously, and from a premeditated design to effect the death of one Phillip Arnold, did make an assault on and upon the said Phillip Arnold with a deadly weapon, to wit: a pistol, and in furtherance of said assault the said Willie Jasper Darden did then and there shoot off and discharge said pistol at and toward him, the said Phillip Arnold, with intent to inflict divers, severe and serious wounds in, on and upon the body and limbs of him, the said Phillip Arnold, with intent then and there to kill and murder the said Phillip Arnold, in violation of Section 784.06, Florida Statutes.

A TRUE BILL /s/ C.W. Adams, Foreman of Grand Jury
Presented in Open Court this 26 day of Sept. 1973

STATE OF FLORIDA
COUNTY OF POLK

The undersigned State Attorney states that he as State Attorney of the Tenth Judicial Circuit in and for Polk County, Florida, as authorized and required by law, has advised the Grand Jury returning this Indictment.

/s/ Glen Darty
GLEN DARTY, As State Attorney
Tenth Judicial Circuit

(Certification Omitted in Printing)

[I; 45-55]

[TRANSCRIPT OF PRELIMINARY HEARING]

IN THE COUNTY COURT OF THE
COUNTY OF POLK, STATE OF FLORIDA

Case Number: CF73-2027

STATE OF FLORIDA, PLAINTIFF,

vs.

WILLIE JASPER DARDEN, DEFENDANT.

The above matter came on for preliminary hearing on September 13, 1973, at 1:30 P.M., in Courtroom "C", in the Hall of Justice Building, Polk County, Bartow, Florida, before the Honorable J. Tim Strickland, Judge. Appearances were Richard Mars, Esquire, for the State of Florida, and Jerry Hill, Esquire, for the Defense.

Thereupon, the following proceedings were had and taken:

MR. MARS: The State is prepared for the preliminary hearing of the State of Florida vs. Willie Jasper Darden.

MR. HILL: Your Honor, Mr. Darden is represented by the Public Defender's Office, and we're ready to proceed at this time. We would request that the rule be invoked.

THE COURT: Who are your witnesses?

MR. MARS: The State has three witnesses, Your Honor, Mrs. Helen Turman, Mrs. Edith Hill, and Don Neal.

The State would call Mrs. Helen Turman as it's first witness.

THE COURT: Alright. Would the other two individuals stand, so I can see who we're talking about.

MR. MARS: Don Neal and the lady in blue, Judge. Mrs. Helen Turman is the woman in the blue dress on the right hand side.

THE COURT: Alright. Mrs. Turman, if you and Mr. Neal will—

MR. MARS: Mrs. Turman will be the first witness, Your Honor.

THE COURT: First witness, alright. Mr. Neal, and who is the other one?

MR. MARS: Edith Hill, and she is outside.

THE COURT: Have her come in because I want her to hear these instructions.

THE COURT: Mrs. Hill, you can stand right there. I just wanted you to hear what I was going to say. I want both of you out of the room at this time. I don't want you to discuss anything among yourselves or anyone else about this case, and after you have testified and gone back outside, I do not want you to discuss anything among yourselves or with anyone else about this case.

Alright, the two of you can step outside.

MR. HILL: Judge, there's a number of charges involved here this afternoon and I would certainly request, if possible, it would be identified as to which charge, each witness is—

THE COURT: What are your intentions, Mr. Mars?

MR. MARS: The State would take them one at a time, Your Honor, and start with the murder.

MR. HILL: That's fine. If you move on, let me know in case I haven't picked it up.

Thank you, sir.

THE COURT: Alright. This is the preliminary hearing of State of Florida vs. Willie Jasper Darden, charged with murder, assault to commit murder, armed robbery, assault to commit rape. Is that everything?

MR. MARS: Yes, sir.

MR. HILL: Mrs. Turman will be testifying to all four of these charges, is that correct?

MR. MARS: (Nods head.)

THE COURT: Alright. Mrs. Turman, would you like this lady who is with you to come up to the stand and be with you while you are testifying?

MRS. TURMAN: Yes, sir.

THE COURT: Alright. You can have a seat right here. Alright. Now, face me and raise your right hand.

HELEN LEE TURMAN

having been produced as a witness on behalf of the Plaintiff and having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MARS:

THE COURT: Alright. Now, you speak loudly so everyone can hear what you have to say.

Q. Would you state your name, please?

A. Helen Lee Turman.

Q. Mrs. Turman, did your husband own a furniture store, Carl's Furniture?

A. Yes, sir.

Q. Is that store in Polk County?

A. Yes, sir.

Q. Were you and he present in that store on the 9th day of September of this year, in the evening?

A. At first only I was in there alone when the gun was pulled in my back. My husband surprised him by opening the back door and starting in and this man still had a hold of my arm. He raised a gun and shot my husband between the eyes.

THE COURT: Ask her to identify.

MR. MARS: Yes, sir.

Q. Can you see this man sitting here?

MR. HILL: Your Honor, I am going to object to that type of identification.

THE COURT: I'm not. Sit down.

MR. HILL: Judge—

THE COURT: Not under these circumstances, Mr. Hill.

MR. HILL: Judge, even as a defense attorney, that shows no respect in court, much less for the Court, and I—

THE COURT: I appreciate—

MR. HILL: And the objection, I want on the record.

THE COURT: I appreciate that. It's on the record. This woman has had a traumatic experience and she—

MR. HILL: Judge, I appreciate that. I still have an obligation to my client.

THE COURT: I appreciate that. Now, if you want to be held in contempt, you pardon me.

Alright, go ahead.

Q. Is this the man that shot your husband?

A. Yes, sir.

Q. Did you subsequently go to the hospital? Did you go to the hospital that day?

A. I went later, two hours later after they got through talking to me in the store.

Q. Did anybody—is your husband now alive or is your husband deceased?

A. My husband passed away at eleven o'clock Saturday night.

Q. September the 9th?

A. Yes, sir.

Q. Okay. Did this man say anything to you when he came into your store?

A. He said he wanted to buy some furniture for some rentals. He wanted two sofas, two cook stoves, electric ranges, three sets of bedding and he said his wife would be in later, to look at it. Then he turned like he was leaving. I thought he had left when I started back toward the back of the store, and he called me back and said he wanted to look at the stoves, and he wanted me to figure it up. I showed him the stoves and as I started back around through the front of the store I saw he had closed the front doors and that's when he grabbed my arm and put the gun in my back.

Q. Okay.

MR. MARS: I have no further questions at this time.

CROSS EXAMINATION

BY MR. HILL:

Q. Mrs. Turman, just one or two questions. Was anyone else present there in the store?

A. No, sir.

Q. Do you remember what time this gentleman entered the store?

A. No, sir. I did not look at the clock, but it was approximately six o'clock, because that's the time my husband always went to the house to feed my poodles for me.

Q. Yes, ma'am. Do you remember the type of clothes being worn by the man inside the store?

A. I can't remember the color precisely what he had on, but I do remember a stripe around the top of the t-shirt and I think a stripe around the bottom of it. I won't swear to that.

Q. Yes, ma'am. It was a t-shirt, did you say?

A. Yes, sir.

Q. Did you—I believe you stated earlier that this man put a pistol in your back, is that correct?

A. Yes, sir.

Q. Once that pistol was put in your back, did you have an occasion to see that man anytime again before he left the store?

A. Yes, sir.

Q. Do you know how long—

A. I can't say how long.

Q. Yes, ma'am.

A. But, I will say when my little neighbor boy come running to our defense, not knowing what was going on—when he shot at Phillip, he fired two shots from the store outside at Phillip and Phillip run, and that's when he dropped loose of me and proceeded to pursue after Phillip.

Q. And did you see him again after he pursued after Phillip?

A. No, sir. I did not.

Q. Had you ever seen this man in your store before?

MR. MARS: Your Honor, I would object to that as being outside the scope of direct examination and getting into discovery.

THE COURT: Sustained.

MR. HILL: I have nothing further, Your Honor.

MR. MARS: At this time, Your Honor, the State would move that the defendant be bound over to the Circuit Court on the charge of murder.

THE COURT: Mrs. Turman, I have only one question, because it's very important and I'll have to go back over it one more time, to be sure.

A. Yes, sir.

THE COURT: Are you sure about the identification of this man you see in front of you as being the same man that you've spoken about?

A. Even with his back to me while I sat back there, I reached over and touched my sister's hand and said, "That's him."

THE COURT: Alright.

MR. HILL: Your Honor, this is not an objection. The only thing I believe was completely left out was location, and I think this would be the time to give the State and opportunity to—

THE COURT: Well, there was testimony that it was in Polk County.

MR. MARS: I said Carl's Furniture Store.

MR. HILL: I heard that. I didn't hear the Polk County.

THE COURT: No, he asked if it was in Polk County.

MR. HILL: Okay.

THE COURT: Alright. The Court is going to bind this matter over on first degree murder to the Circuit Court for arraignment to be held—

MR. MARS: Your Honor, may I have a moment to confer with Mr. Weatherford? There are other charges pending against this fellow and if I could find out from Mr. Weatherford how much time he needs—

THE COURT: Well, I'm going to set it for three weeks from next Monday. Does that cause you any problem, Mr. Weatherford?

MR. WEATHERFORD: No, sir. I'm not actively investigating this case.

THE COURT: Alright.

MR. HILL: There is a matter of a grand jury anyway, I believe, in a crime of this nature, sir.

THE COURT: Well—

MR. MARS: At this time, Your Honor, the State would no bill the other charges for the preliminary hearing.

THE COURT: As to what?

MR. MARS: We would no bill the armed robbery, assault to commit murder, and assault to commit rape.

THE COURT: Alright. You ladies can have a seat. Is that everything?

MR. MARS: The State has no further business.

MR. HILL: That's all, Your Honor.

(Hearing concluded.)

[Court reporter's certificate omitted in printing]

[III; 2-182]

[TRANSCRIPT OF JURY SELECTION AT PETITIONER'S TRIAL]

IN THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

STATE OF FLORIDA, PLAINTIFF,

vs.

WILLIE JASPER DARDEN, DEFENDANT.

Case No. CF 73-2027

TRIAL of the above-styled cause was held on January 15, 16, 17, 18 and 19th, 1974, in the courtroom, County Courthouse, Inverness, Florida, beginning at 9:00 A.M. o'clock, before the Honorable John H. Dewell, Judge presiding.

Appearances were: C. Ray McDaniel, Esquire, Assistant State Attorney; Norman White, Esquire, Assistant State Attorney, for the State; Raymond A. Goodwill, Esquire, Assistant Public Defender and Dennis Maloney, Esquire, Assistant Public Defender, for the Defendant; the Defendant; the witnesses; The Court Clerk; and the official court reporter.

Thereupon the following proceedings were had and taken:

* * * *

[DEFENSE MOTION TO LIMIT VOIR DIRE]

* * * *

THE COURT: All right. We are here to hear a motion. The State and the defendant represented by counsel, the defendant is present in person. We are to hear a motion by the defendant to limit the State Attorney of his voir dire examination, arguing the Willie Spoon case.

All right, sir, I am not inclined to grant it. I will be glad to listen to you on it.

MR. MALONEY: Your Honor, I do not wish to argue very longly. The Court held in the Willie Spoon case the prosecutor could not ask these type of questions. In Florida we now have biforcated trial. The first part of the trial is used only to determine the question of facts, whether or not this individual committed a capital crime.

THE COURT: Yes, sir.

MR. MALONEY: I think that a question regarding how the jury would be disposed to punishment in the event they found a verdict of guilty would be irrelevant and immaterial to that trial and to their determination of the question of fact, whether or not he did it. And all we are asking is that such questions first not be asked by either parties, and if, in fact, the Court is going to allow the questions to be asked, that a response in the negative they would not impose the death penalty not constitute a challenge for cause.

THE COURT: No, sir, if, at the conclusion of the trial, the jury should return a verdict of guilty of murder in the first degree, which is a capital offense, the same jury would serve as the jury in the second half of the biforcated trial and there will not be a reselection of a jury. At this time on voir dire it is necessary to ask questions of this jury including their attitude on such things and it's got to be now.

Under the Florida capital punishment law there are certain conditions set up under which the proper penalty is the death penalty. In a prospective jury—It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it or if he did follow it, it would be going against his principles, and, therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause.

You made your motion and your objection and the motion will be denied. You will, of course, be allowed at the time of the voir dire examination to raise your namely objection, but would indicate the ruling at this time. I am not cutting you off from objecting when we get to that specific question. Generally, that will be my ruling. I won't cut them off from inquiring in the general area; the specific questions they ask may be objectionable, I don't know.

MR. MALONEY: If I raise the objection, which I would, will the Court make it a continuing objection?

THE COURT: Yes, sir.

MR. McDANIEL: Is the Court saying it is going to be a continuing objection from here on out?

THE COURT: Continuing objection to that particular line of questions.

MR. McDANIEL: I take it your objection right now is continuing from here on out?

THE COURT: Yes, sir, to the whole general line of questions. Still I am not telling you I will deny your objection on some specific question for some other reason you feel it has gone too far.

MR. MALONEY: Yes, sir.

* * * * *

[TRIAL COURT'S INSTRUCTIONS
TO JURY ON SENTENCING RESPONSIBILITY]

* * * * *

THE COURT: Now the first count, first degree murder, charges what is under the present law a capital offense. You may be aware that some time ago the capital punishment law of Florida was declared invalid by the Courts, by the U.S. Supreme Court. Since then the legislature has passed a new capital punishment law in Florida that is, and that law is in effect here today. Now under the new law in the event of a capital crime, such as we have here today, we have what is known as a bifurcated trial. That is a trial will be conducted in two parts.

In the first part the jury will hear the evidence in the case and will determine the guilt or the innocence of the defendant without regard to punishment at all, just determine the guilt or innocence of the charge. In the event the jury should return a verdict of not guilty or guilty of some lesser included offense less than a capital crime, of course, then that is the end of the trial. In the event that the jury should come back with a verdict of guilty of first degree murder, which is the capital offense then would be held by the same jury the second part of the bifurcated trial.

During the second part of the trial the jury would then be allowed to hear additional testimony concerning facts that were not admissible in consideration of the guilt or innocence. Matters of age or other factors listed in the Statute of mitigating or aggravating factors which could be considered. The jury would then, by a majority vote—now a vote of guilt or innocence must be a unanimous verdict, everyone must agree—but on your second verdict which is known as an advisory sentence the jury by a majority vote would recommend to me as a Court what the proper sentence should be. If they find that the aggravating circumstances are sufficient and they are not outweighed by mitigating circumstances then the proper recommendation would be that the death penalty be imposed. If they find that the mitigating circumstances outweigh any aggravating circumstances, then the recommendation, the verdict should be the advisory sentence should be for life imprisonment.

In either event the final decision is not the jury's. The final decision is rested solely with the Court. It will be my decision in the event of a verdict of guilty of first degree murder it will be my decision to whether or not, my determination alone, as to whether or not this defendant should go to the electric chair. I do want you to understand though that the law intends and I certainly would give great weight to what the advisory sentence would be. So you should not take your duties lightly. However, I would not be obligated to follow it. The jury might return a recommendation, advisory sentence of the death penalty and I might reduce it to life imprison-

ment and the jury might recommend life imprisonment and I would feel that they were wrong and sufficiently strongly to go ahead and administer the death penalty anyway. Both have been done in this state under the law, the new law.

Now that is a procedural situation, that is where we stand. I will tell you further in the event of life imprisonment on a capital crime the law provides that the defendant shall serve not less than twenty-five calendar years before he becomes eligible for parole which is contrary to the usual life sentence in any other life sentence the ordinary parole laws would apply.

Now do y'all understand the procedure in a bifurcated trial?

* * * *

[VOIR DIRE CONCERNING JUROR VIEWS
ON DEATH PENALTY]

* * * *

At this time I want to get off into a different area concerning the capital punishment feature of the case. I have explained to you already the basic procedure. How we have a two section trial and how although the final determination in the event of a verdict of guilty of first degree murder the final determination as to penalty will be mine. But that you, if you are selected on the jury, would be called upon to listen to further testimony and to advise me by advisory sentence.

Now at the time of the submission of the case, should that time ever arrive, you will be instructed by me on the law as to what matters you should consider and what you should not consider and how you should go about in arriving at your advisory sentence. Under certain circumstances if you find the aggravating circumstances are sufficient they are not outweighed by mitigating then it would be proper under the law your correct verdict would be to recommend the death penalty.

Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or con-

scientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation? Do you understand my question?

MR. MALONEY: Your Honor, pursuant to the motion I filed beforehand I object to this question. I believe that it is irrelevant to the matter at hand and I think that the discussion of this at this time prejudices the defendant's right to a fair and impartial trial.

THE COURT: All right, sir. Motion will be denied and the objection overruled.

All right, Mrs. Macy, do you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence?

MRS. MACY: No, sir.

THE COURT: Do you, Mr. Blankenship?

MR. BLANKENSHIP: No, sir.

THE COURT: Mr. Pelellat?

MR. PELELLAT: No, sir.

THE COURT: Mrs. Spike.

MRS. SPIKE: No, sir.

MR. VARNEY: Yes, sir.

THE COURT: You feel then, sir, that even though and I am not saying it will it would be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?

MR. VARNEY: I believe I would.

THE COURT: All right, sir. You will be excused.

MR. MALONEY: I renew the objection. I do not think he should be challenged for cause.

THE COURT: Yes, sir, the objection will be noted and overruled.

All right, Mr. Varney, you will be excused. Thank you very much for your service.

CLERK: Debora Ratley.

(Ms. Ratley was seated in the jury box.)

CLERK: Number 114.

THE COURT: Mrs. Hann, do you hold such strong conscientious moral or religious beliefs that you would be unwilling under any event to return a death sentence?

MRS. HANN: No, sir.

THE COURT: Mr. Waller?

MR. WALLER: No, sir.

THE COURT: Mr. DeMilt?

MR. DeMILT: No, sir.

THE COURT: Mr. Dorminy?

MR. DORMINY: No, sir.

THE COURT: Mrs. Keck?

MRS. KECK: No, sir.

THE COURT: Mr. Roberts?

MR. ROBERTS: No, sir.

THE COURT: Mr. Mays?

MR. MAYS: Yes. I could not recommend it.

THE COURT: All right.

You will be excused, Mr. Mays. Mr. Maloney, I assume you wish the same objection to apply to him.

MR. MALONEY: Yes, Your Honor.

THE COURT: So recorded.

(Mr. Mays was excused from the jury box.)

* * *

THE COURT: Do either of you know of any reason why you couldn't sit as a fair and impartial jurors in this case?

MR. PURCELL: No.

MR. O'BRY: No.

THE COURT: Do either of you hold such strong moral or religious conscientious principles in opposition to the imposition of the death penalty that you would be unwilling to recommend the imposition of the death penalty regardless of the evidence?

MR. PURCELL: No.

MRS. O'BRY: No.

* * *

THE COURT: Do either of the three of you hold such strong religious, moral or conscientious principles in opposition to the imposition of the death penalty that you would be unwilling to vote to recommend the death penalty regardless of what the evidence was?

MR. CARHUFF: No, sir.

MR. SCHNEIDER: No, sir.

MRS. LUCKER: No, sir.

THE COURT: * * *

Ms. Carn, the fact your husband for a while was a police officer and the fact that we have here listed as witnesses many police officers and deputy sheriffs conceivably could raise a little bit of a problem. Do you think that because of your husband's previous occupation that you might be a little inclined to give what the officers say more weight than you would any other witness you didn't know?

MS. CARN: I don't think that would; but I do not believe in capital punishment.

THE COURT: The question isn't, ma'am, whether you believe in capital punishment or not; the question is whether or not you have such a strong disbelief in it as to make it unable for you to vote to return a recommendation of the death penalty regardless of what the evidence might be.

MS. CARN: That's right.

THE COURT: All right, ma'am. Then we will excuse you then right now. I appreciate your candor.

MR. MALONEY: Your Honor, once again I object. I don't think that is relevant.

THE COURT: Objection will be noted.

(Ms. Carn was excused from the jury box.)

THE COURT:

I have asked the others and I will ask each of the four of you whether you have such strong religious, conscientious or moral principles against the imposition of the

death penalty that you would be unwilling to vote to return a recommended sentence of the death penalty regardless of what the evidence or the facts might be?

Would you Ms. Pigeon?

MS. PIGEON: Yes, sir.

THE COURT: Mr. Wall?

MR. WALL: No, sir.

THE COURT: How about you, Ms. Maher?

MS. MAHER: Yes, I do have such convictions. I am a Seventh Day Adventist.

THE COURT: And no matter what the evidence showed you don't think you would vote for it?

MS. MAHER: I couldn't, sir.

THE COURT: Very well, over the objections of the defendant she will be excused.

(Ms. Maher was excused from the jury box.)

THE COURT: How about you, Mr. Parker?

MR. PARKER: No.

THE COURT: All right. Mr. Embach, do you have such strong religious or moral or conscientious principles in opposition to the death penalty that no matter what the evidence is you would not be willing to vote to return a verdict?

MR. EMBACH: No, sir.

THE COURT: Recommending it.

MR. EMBACH: No, sir.

THE COURT: Fine, sir.

THE COURT: Do you have such strong religious or moral or conscientious principles in opposition to the death penalty that you would be unwilling to recommend, no matter what the facts were, you would be unwilling to recommend the death penalty to the Court?

MR. LORD: No.

THE COURT: Do you have such strong principles in opposition to the death penalty under no factual situ-

ation would you be willing to vote to recommend to the Court the imposition of the death penalty?

MR. HUDSON: No.

* * *

THE COURT: Do you have any religious, moral or conscientious principles against the death penalty that are so strong that you would be unwilling to vote to recommend the death penalty regardless of what the facts might be?

MRS. MAYS: No, sir.

* * *

THE COURT: Do you have any opinions or principles in opposition to the death penalty that are so strong that it would make it impossible or very difficult for you to vote to recommend a verdict of a death sentence regardless of what the facts might be?

MR. STAHA: No, sir.

* * *

CLERK: Theodore T. Murphy. Number 87.

(Mr. Murphy was seated in the jury box.)

THE COURT: Mr. Murphy, what is your occupation?

MR. MURPHY: Retired.

THE COURT: What did you do prior to retirement, sir?

MR. MURPHY: Several jobs. I was eight and a half years in the administration office in a seminary, before that I was thirty years with the utilities.

THE COURT: What seminary were you with, sir?

MR. MURPHY: St. Pios, Uniondale, New York.

THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then.

(Mr. Murphy left the jury box.)

* * *

THE COURT: If the facts justify it would you have no such principles in opposition to the death penalty that you would be unwilling to vote to recommend the death penalty?

MRS. MULROY: Depending on the evidence.

THE COURT: Yes, ma'am.

* * *

THE COURT: Do you hold any religious, conscientious or moral principles which are opposed to the death penalty, which feelings are so strong that you would be unwilling to recommend the death penalty?

MR. MACHETT: No.

* * *

THE COURT: Do you hold such strong principles in opposition of the death penalty that you would be unable without violating them to recommend them, recommend a death penalty to the Court?

MR. ADKINS: No, sir.

* * *

[IV; 199-287]

[TESTIMONY OF HELEN TURMAN]

HELEN TURMAN, having been produced as a witness on behalf of the State and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McDANIEL:

* * * *

Q. All right. Mrs. Turman, on that [September 8, 1973], did something happen?

A. Yes, sir.

Q. All right. Start and tell the Jury what happened on that date?

A. At somewhere between 5:00, 5:30 and 6:00, I can't remember the time, this colored man came—was in the store, as I was—

Q. Let's start just before that, Mrs. Turman, please. Was your husband—where were you at five o'clock or so?

A. I was in the store.

Q. Was anyone with you?

A. No, sir.

Q. What happened at that time?

* * * *

A. As I opened the back door on the store, a colored man stood at the door. He says, "Oh, there you are." I says, "Yes, sir, what can I help you with?" He says, "I want to look at some furniture and I want approximately \$600 worth of furniture for some furnished apartments," rooms or apartments.

Q. Was anyone with you?

A. I was alone.

Q. Was anyone with him?

A. No, sir, I did not see anybody.

Q. Then what happened?

A. I proceeded to show him the furniture. He looked at two couches, bedding.

Q. Tell the Jury, describe to the Jury for them, the type of building and type of business it was.

A. The back part of the store was frame.

Q. Frame?

A. Frame. It was dark back in there, and the front part of the store was concrete block.

Q. What kind of door was on the front?

A. On the left hand, well, entering the store, it would be the right-hand side of the door—of the store is a large, sliding door. It slides up overhead.

Q. Yes, ma'am.

A. And then the glass door where you enter is a sliding glass door which slides to the side. Then there is a big window on the other side.

Q. All right, any other doors?

A. There is, in the other end is another large, sliding, loading door that slides overhead.

Q. All right. What were the lighting conditions in the front part of the store?

A. Very poor.

Q. In the back part?

A. Very poor.

Q. Did you have any lights on?

A. I did have some lights on, but not all.

Q. Do you have an office in the building or in the store?

A. I had my desk setting just inside the frame part of the building from the concrete block part.

Q. All right. You said that this man asked you or told you he wanted to buy about \$600 worth of furniture for apartments?

A. For furnishing for furnished apartments.

Q. For furnished apartments?

A. Yes.

Q. And he asked you for something specific?

A. Bedding, couches and ranges.

Q. All right, then what happened?

A. I proceeded to show him what I had. I showed him the bedding and the couches. Somehow I had neglected to take him into the room where the ranges were.

I thought he had left. He said his wife would be back; and I went, started back into the back of the store again, back where my desk was, when he returned and said he would like to see the ranges, the stoves.

Q. The same man, ma'am?

A. Yes, sir.

Q. All right.

A. I'd taken him over to where the stoves were and showed him and he pointed out two stoves and he told me not to forget to show those two to his wife when she came.

Q. Go ahead.

A. And so he asked me the price or what—if I could total that up. And I said I can go to my adding machine and total it up and give you what that totals. And, as I turned my back and started out, I got out to where a mahogany Duncan Phyfe table was sitting with chairs on it when I felt the gun hit my back. And he held my right arm here. He says, "Do as I say and you won't get hurt."

Q. All right, what happened next?

A. He reached out with his other hand with the gun and pulled the loading door down with the gun and then asked for the key to the glass door. I said, "There is no key, I lock it with a stick." So he told me to fasten it and as I picked up the stick, he says, "Don't try anything funny." So I fastened the door.

Q. With the stick?

A. With the stick.

Q. All right, ma'am.

A. And then he taken me on back to the office and where the cash register was. He told me to open the cash register.

Q. Was it locked?

A. No.

Q. Okay. Did you open it?

A. I opened it.

Q. What happened?

A. He told me to back up with my back against the refrigerator. He taken the bills out, did not bother the change, the silver.

Q. Do you know how many bills he took out?

A. Not exactly, but I will say not more than \$15. I don't know how much I had.

Q. Are you positive it was at least one dollar?

A. I am.

Q. Then what happened? What did he do with the money, ma'am?

A. He stuck it in his pocket.

Q. Did he still have the gun at that time?

A. Yes, sir.

Q. Do you know which hand he had the gun in?

A. I don't know.

Q. At that time?

A. At that time.

Q. So he took the money out of the cash register himself?

A. Yes, sir.

Q. Put it in his pocket?

A. Yes, sir.

Q. Then what did he do?

A. He told me to go on toward the back of the store. I started around—I was getting weak in my knees. I thought I was going to fall. He told me to stand up and keep going. We got back to the back room of the store where I had box springs and mattress stacked against the wall. And about that time, my husband opened the door. When he reached across my right shoulder and I screamed, "No, Jim, don't come in," but it was too late. He had already fired the gun and shot my husband. My husband did not have a chance to say a word. He just threw his hands up like that and fell backward onto the ground.

Q. All you said to your husband at that time was "Jim, don't come in"?

A. Right.

Q. And your husband did not respond?

A. He did not respond.

Q. Did this man say anything to him?

A. No, sir.

Q. Were any other words said at all at that point?

A. Yes.

- Q. Okay, what was that, ma'am?
- A. He turned, he stepped in front of me and held the gun on me. He says, "Stand still, don't move."
- Q. Who said this?
- A. The colored man.
- Q. All right.
- A. While he held the gun on me, he reached out out the door, taken hold my husband's belt and pulled his head into the puddle of water there in the door. One leg was in the door, the other was up on the side of the building.
- Q. All right.
- A. This is the position my husband laid in on his back. He came back in and then he told me to go in the adjoining room where mattresses were stacked.
- Q. Did anyone close the door, Mrs. Turman?
- A. He did.
- Q. Ma'am?
- A. He did.
- Q. Was he able to close it completely?
- A. No.
- Q. Why?
- A. Because my husband's foot—one foot was in the door.
- Q. Mrs. Turman, did your husband ever move or get up after the shot was fired?
- A. No, sir.
- Q. Do you know where the shot hit your husband?
- A. Yes, sir.
- Q. Where?
- A. Between the eyes.
- Q. All right, what happened then?
- A. He told me to get down on the floor.
- Q. Where was this, Mrs. Turman?
- A. In the mattress room.
- Q. How far is this from the back door where your husband was lying?
- A. It's right at the back door.
- Q. Can you estimate in footage?
- A. About three foot.
- Q. Did you get down on the floor?
- A. I sat down on the floor.

- Q. All right. Where you were sitting, how far was that from your husband's body?
- A. Four to five feet.
- Q. All right, go ahead. You say four to five feet?
- A. Yes.
- Q. What happened then?
- A. I asked him to please let me go to my husband. He says, "He is all right. I only shot him in the shoulder." He told me to take my teeth out. I didn't have my teeth in.
- Q. What was he doing at the time he told you to take your teeth out?
- A. He was unzipping his pants and undoing his belt buckle.
- Q. Then what happened?
- A. I cried, "Lord, have mercy." And he taken his penis out and told me to suck it.
- Q. What happened then, Mrs. Turman?
- A. Again I cried, "Lord, have mercy." He told me to get up and he was taking me back toward the front of the store.
- Q. Did he zip his pants back up?
- A. I don't know.
- Q. How long were you on the floor, do you know?
- A. Just a few minutes or seconds. I was too scared to even estimate the time.
- Q. What happened then?
- A. As we got halfway back up through the building by a sewing machine I had out, had been sewing that day, as we got there, Phillip Arnold, a part-time employee, he hadn't worked for two or, I'd say, approximately two months or a little more.
- Q. Where does Phillip live?
- A. Two doors from us. When he came and shoved the back door open.
- Q. Where were you and this man at that time when he shoved the back door open?
- A. By the sewing machine.
- Q. All right, was this in a direct line?
- A. It was in a direct line of the door.

Q. Direct line from the back door?

A. Yes, sir.

Q. All right, what happened then?

A. I screamed "Phillip, no. Go back, go back." At that time he left me and run to Phillip.

Q. Who left you?

A. The colored man.

Q. Go ahead.

A. And I heard sort of a click of a gun which was a misfire and then I heard a shot and I saw him shoot Phillip in the face.

Q. Then what happened?

A. Phillip run and he proceeded to run after Phillip, and I turned and ran to the phone and dialed the operator, give my name and my address, told her what had happened and for her to please call the sheriff for me. And I hung up and went back to my husband's side.

Q. Did you see Phillip at that time?

A. The last I saw of Phillip before he was put in the ambulance was when he was running across the yard and running back toward some houses back of us.

Q. All right. You said a moment ago that Phillip was in the back door which is the same back where your husband was lying half in and half out?

A. Right.

Q. You said that Phillip opened the back door?

A. Yes.

Q. What was Phillip doing at the time he opened the back door? Could you see him then?

A. I saw him. That's when I screamed to him. He didn't know what was going on.

Q. Did you hear Phillip say anything?

A. I did not. He said he did, but I did not hear it. I was too frightened and screaming for him to go back.

Q. Was he running at that time, ma'am?

A. Yes, sir.

Q. You say you saw Phillip over your husband's body?

A. I did.

Q. The man walked from the back room, from you, and you heard a click and the man shot Phillip in the face?

A. Yes, sir.

Q. How many shots did you hear there at the body?

A. Three—two.

Q. Click and shots, ma'am, which?

A. One click and two shots.

Q. That was at the body?

A. Yes, sir.

Q. Did you hear any other shots?

A. I did not. Evidently the other one which I was told was fired.

MR. GOODWILL: I object, Your Honor.

THE COURT: Objection sustained, as to what you have been told.

Q. You did not hear another shot?

A. I did not.

Q. You heard a click and two shots while Phillip was over your husband's body?

A. Right.

Q. Mrs. Torman, I want you to look around the courtroom today and see if you see this man.

MR. MALONEY: Your Honor, I object and request the Jury be excused for the purpose of a motion.

THE COURT: All right. I will allow your request. Mr. Bailiff, if you will take the Jury out for a minute.

(The Jury left the courtroom.)

(JURY OUT)

THE COURT: All right.

MR. MALONEY: Your Honor, I would move to suppress the identification of the Defendant by this witness on the grounds that the identification subsequent to the arrest of the Defendant by this witness was tainted.

THE COURT: On what basis, sir?

MR. MALONEY: I think, sir, that there is standard procedure which should have been followed in the interest of fairness, were not followed here and I would re-

quest the Court to allow me to ask Mrs. Turman a few questions.

THE COURT: All right, sir. Proceed.

EXAMINATION

BY MR. MALONEY:

Q. Mrs. Turman, when is the next time that you had occasion to see the man who was in your store?

A. The day after the funeral.

Q. Do you remember why you were there?

A. To identify him.

Q. Was this at a hearing or did they take you to the police station?

A. To a hearing.

Q. Do you know if that was a preliminary hearing?

A. Yes, sir.

Q. And that was the first time that you had seen him after the store?

A. Yes, sir.

Q. Do you remember a man named Richard Mars who was an assistant State attorney there that day?

A. Yes, sir.

Q. Do you remember a man named Gerald Hill?

A. Yes, sir.

Q. Before this hearing, had the police shown you any photographs?

A. No, sir.

Q. Before the hearing, had you had occasion to see the man in what is commonly known as a lineup?

A. No, sir.

Q. I realize that you must have been quite upset by this, but did you read the papers regarding this incident?

A. No, sir, I have never yet even to this day read the account of my husband's death.

Q. All right, ma'am.

MR. MALONEY: Your Honor, I'd like to draw the Court's attention to the preliminary hearing and the identification which Mrs. Turman has stated the first oc-

casation to see the person who was in the store afterwards. The identification, in my opinion, was tainted at the preliminary hearing.

"Question by the Court."

MR. McDANIEL: Your Honor, I object unless Mr. Maloney—the proper way to do it is ask the witness if a certain question was asked and if a certain response was given, if he is going to impeach a witness; but not testify yourself from a transcript.

MR. MALONEY: Your Honor, I'm not attempting to impeach this witness, I am merely saying that the procedures followed were inadequate.

MR. McDANIEL: Then that's up to you to prove it, not for the Court to allow you to testify from a transcript.

MR. MALONEY: Would the Court take judicial notice or would the Court read this transcript or allow me to read it into the record?

THE COURT: Yes, sir. I assume that's a transcript prepared by an authorized court reporter?

MR. MALONEY: Yes, sir, it is. Alice D. Wren.

MR. MALONEY: Statement by the Court, Judge Strickland.

MR. McDANIEL: Your Honor, would you allow him to tell the Court who the Plaintiffs were at that time?

MR. MALONEY: The players at that time were Judge Strickland, Mr. Richard Mars and Mr. Gerald Hill. On the stand was Mrs. Turman.

THE COURT: All right, sir.

MR. WHITE: Mr. Maloney, what page are you on now?

MR. MALONEY: I am on Page 7. Judge Strickland asked her to identify "Mr. Mars, Answer, Yes, sir."

Mr. Mars says then, "Can you see the man sitting here?" At that point, Mr. Hill "Your Honor, I'm going to object to this type of identification."

THE COURT: Was Mr. Hill representing the Defendant?

MR. MALONEY: Yes, Your Honor, he was.

THE COURT: All right, sir.

MR. MALONEY: "The Court: I am not—sit down." Your Honor, I believe that the police had the man in custody hours after this.

THE COURT: I didn't quite follow that colloquy.

MR. GOODWILL: Your Honor, that was part of the reason for the objection. Bits and pieces can be reconstructed of what occurred.

MR. McDANIEL: Only from the transcript, Your Honor.

MR. GOODWILL: Or from the testimony of Mrs. Turman.

MR. McDANIEL: Right.

THE COURT: I read the balance of the colloquy as follows: "Mr. Hill: Your Honor, I am going to object to this type of identification.

"The Court: Not under these circumstances, Mr. Hill.

"Mr. Hill: Judge, even as Defense attorney, that shows no respect for the Court, much less for the Court.

"The Court: I appreciate it.

"Mr. Hill: The objection I want on the record.

"The Court: I appreciate that. It's on the record. This woman has had a traumatic experience, Mr. Hill.

"Mr. Hill: Judge, I appreciate that. I still have an obligation to my client.

"The Court: I appreciate that. If you want to be—if you want to be held in contempt, you pardon me. All right, go ahead."

MR. MALONEY: Yes, sir.

THE COURT: All right, what is your position?

MR. MALONEY: Your Honor, I think this—in this case, in a case such as this where eyewitness identification is so important, the police could have exercised and they should have exercised more fair procedure. The man was in custody. They could have had a lineup in which six men of his same race, same general height, general build, general age were used and allowed the woman to pick him out of the lineup. If that were too traumatic, they could have used a photograph lineup as they did in another occasion. But they didn't do that either. Instead, they waited for a preliminary hearing some days later when the Defendant was the only black man in the room.

MR. McDANIEL: Objection, Your Honor. That's an assumption on Mr. Maloney's part.

THE COURT: Yes, sir.

MR. McDANIEL: Move to strike it, Your Honor.

THE COURT: The objection will be sustained. Go ahead, sir.

MR. MALONEY: Your Honor, I realize that this is not on testimony. I was in the room at the time.

THE COURT: Go ahead, sir.

MR. MALONEY: In short, Your Honor, we move the identification be suppressed on the grounds that the identification which the lady is about to make now quite possibly was made from the identification at the preliminary hearing, and that identification was tainted because Mr. Jordan was the only black man in the room and because Mr. Mars pointed out the man and said—

MR. McDANIEL: Objection, Your Honor. This is not in the transcript, at least my recollection of the transcript.

MR. GOODWILL: Your Honor, would you allow Mr. Maloney to go ahead and finish his argument and then if Mr. McDaniel has objections to it, he certainly would have an opportunity to present it to the Court.

THE COURT: No, sir. Mr. McDaniel, I will make—

MR. GOODWILL: The constant interruptions—

MR. McDANIEL: I'm not objecting to his argument. I am objecting to his testimony.

THE COURT: No, sir, I'm going to allow him to object any time he thinks it necessary. Go ahead, sir.

MR. MALONEY: I think Mr. Mars said, "Can you see the man sitting here?" I was in the room. He pointed at the man and said, "Can you see the man sitting here?" The only black man in the room and from that identification, the man was—

THE COURT: All right, sir, Dennis, assuming that all this will be—could be proved, I will still not sustain your motion. What the State could have done or could not have done, or what the enforcement officers could have done or should have done are matters to go to the believability of the identification and proper matters for

consideration by the Jury. They don't go to the admissibility of identification and they do not render it inadmissible. So I will overrule, deny your motion, overrule your objection.

MR. McDANIEL: Your Honor, may I ask one question of the Court?

THE COURT: Yes, sir.

MR. McDANIEL: Mr. Maloney testified that, in his testimony that the police did this and the State did this. My recollection—I don't have a copy of the transcript—this is the Court doing this, is it not?

THE COURT: Partially the Court and partially the State attorney, assistant State attorney.

MR. McDANIEL: Thank you, Your Honor. Are you ready, Your Honor?

THE COURT: Yes, sir. All right, Mr. Bailiff, bring in the Jury.

(The Jury returned to the courtroom.)

(JURY IN)

* * *

DIRECT EXAMINATION (Continued)

BY MR. McDANIEL:

Q. Mrs. Turman, my last question to you was, I asked you to look around the courtroom and tell me and tell the Jury whether or not the man that was in your house on that particular date, the colored man that murdered your husband, is in the courtroom today. Can you do that?

A. Yes, sir.

Q. Is he in the courtroom?

A. He is.

Q. Would you point him out to the Jury, please?

A. Right there.

Q. Are you pointing to the man at the end of the table?

A. Yes, sir.

MR. McDANIEL: Let the record show that the witness identified the Defendant.

Q. Mrs. Turman, I want you to look at the man very, very, very carefully.

A. Yes, sir.

Q. Is there any question in your mind whatsoever?

A. None.

Q. Does he appear the same as he did on September the 8th?

A. No, sir.

Q. What, if anything, has he done since that date?

A. He has grown a goatee and his hair is not combed down like it was. It's more bushed out. He was very clean shaven, appeared very intelligent, and at first talked very intelligent.

Q. Mrs. Turman, after the September 8th, until today, have you seen Mr. Jordan?

A. The day after the funeral, as I said.

Q. Do you remember when the funeral was?

A. Yes, sir, September 13th, on a Wednesday.

Q. You say you saw Mr. Jordan the day after?

A. Yes, sir.

Q. Where was that?

A. At the preliminary hearing.

Q. Did you have any trouble identifying him on that date?

A. I did not.

Q. And again, you're absolutely positive?

A. Yes, sir.

Q. All right. Have you seen Mr. Jordan since that date until today?

A. No, sir.

Q. Have you seen him in the Courthouse—how long have we been in trial now—yesterday?

A. I did not.

Q. Or today?

A. Not until I come in this room.

Q. Mrs. Turman, on September the 8th, would you describe if you can how Mr. Jordan was dressed?

A. Very neat. Color, I cannot—but he was neat.

Q. Did he have a suit on?

A. I don't recall whether it was a complete suit or whether it was sports clothes—he did have a sport shirt with a stripe around the neck.

Q. What kind of sport shirt are you talking about?

A. A pullover.

Q. Pullover?

A. Pullover.

Q. And what was around the neck?

A. A stripe.

Q. Do you recall whether he had glasses on that day or not?

A. No glasses.

Q. Do you recall whether he had a hat on?

A. No, sir.

Q. You don't recall, or he did not?

A. He did not.

Q. Do you recall his pants?

A. No, I don't recall the color, no, sir.

Q. Can you remember whether they were light or dark?

A. They were dark, but the color, I don't know.

Q. Were they solid, or some other?

A. Solid.

Q. Do you remember he had any shoes on or anything he had on?

A. I did not look.

Q. Do you know if he was barefooted, or do you know?

A. I don't know.

MR. McDANIEL: Excuse me a minute, Your Honor.

THE COURT: Yes, sir.

MR. McDANIEL: Your Honor, may the attorneys approach the Bench?

THE COURT: Yes, sir.

(The attorneys approached the Bench.)

(A discussion was held at the Bench as follows:)

MR. McDANIEL: I am fixing to bring the gun out marked for identification. She cannot identify the gun. I want to show her the gun and ask her if it is the same

size, but she is not able to identify it as being the gun.

MR. GOODWILL: Do you want—

MR. McDANIEL: Do you want to object now or later?

MR. GOODWILL: If she can't identify the gun, what is the relevance for them to see it? It would only prejudice them, that's the only reason for doing it at this time.

MR. McDANIEL: Well, I will withdraw it.

(The attorneys left the Bench.)

Q. Mrs. Turman, you testified earlier that Mr. Jordan had a gun. Did he have more than one gun?

A. I only saw one.

Q. All right. Would you describe that gun to the Jury to the best of your ability?

A. To the best of my ability, it was a hand gun.

Q. What do you mean, hand gun?

A. I don't know one gun from another. I am not acquainted with guns. It was a hand gun. It wasn't a long rifle.

Q. All right. Could you estimate the entire length of the gun he had in his hand with your hands ma'am?

A. That would be really hard to say, but maybe—

Q. The entire length of the gun?

A. I think so.

Q. All right. Do you recall the color?

A. It looked dark.

Q. Dark?

A. Yes, sir.

Q. That's all you remember?

A. Yes, sir.

Q. Anything else distinguishing about the gun Mr. Jordan shot your husband with?

A. No, sir.

Q. No, strike that.

MR. McDANIEL: May I have a moment, Your Honor?

THE COURT: Yes, sir.

Q. Mrs. Turman, between the time your husband was shot and the time you saw Mr. Jordan at the preliminary

hearing, did you have an occasion to see any newspaper articles where Mr. Jordan's photograph was in that article?

A. I did not.

Q. Did you read any newspaper article?

A. I did not. I was too upset making funeral arrangements. I did not read a paper and have not yet to this day read a paper in the State of Florida. While I was back in West Virginia, I did read some papers, but there was nothing in West Virginia papers about it.

Q. Mrs. Turman, between the day your husband was murdered and the preliminary hearing, did any police officers or anyone else show you any photographs?

A. No, sir.

Q. Until this day, has anyone attempted or shown you a photograph of this Defendant?

A. No, sir.

Q. Can you estimate approximately how long Mr. Jordan was in your presence in the store?

A. I'd say about ten minutes.

Q. Would that be before and after your husband was killed?

A. Yes, sir.

Q. All right. Do you have any question in your mind that this is the man that murdered your husband?

A. None.

MR. McDANIEL: I have no further questions.

THE COURT: All right, I think we will take a recess before you cross-examine. Everyone rise while the Jury's excused.

(There was a brief recess and Court reconvened with the same appearances.)

THE COURT: All right, Mr. Bailiff, bring the Jury in. Will everyone rise while the Jury comes in.

(The Jury returned to the courtroom.)

(JURY IN)

CROSS-EXAMINATION

BY MR. GOODWILL:

Q. Mrs. Turman, Do you remember me from taking your deposition sometime back?

A. Yes, sir.

Q. There's some questions that I want to ask you as far as events of that day, which I realize from our prior encounter are most difficult for you to testify. In order to make sure that all points have been covered from both the standpoint of the prosecution and of the defense. Do you recall immediately after this very unfortunate event occurred, speaking to an Officer Don Neil with the Polk County Sheriff's Department?

A. I don't recall all names.

Q. And do you recall an officer taking a statement from you?

A. Yes, sir.

Q. Probably on a tape recorder?

A. Yes, sir.

Q. Do you recall what your description of the man that had committed these acts was at that time or what the description was that you gave him at that time?

A. I recall telling him as for giving a definite description, I am a poor hand at doing it; but I do remember faces. But to describe someone I can't really do it.

Q. Okay. Isn't it true that you have made the statement both to Mr. Neil and in a subsequent deposition that you really don't pay that much attention to customers when they come in?

A. I did make that statement that I don't pay that much attention to how they are dressed or anything, but faces I do remember. I remember my customers.

Q. All right. Now what time did you say that Mr.— that this man came into your store the first time?

A. Between 5:30 and 6:00.

Q. All right. Do you recall telling Officer Neil that it was six o'clock or possibly a little after?

A. I don't recall saying after.

Q. Is it possible, though, it was six o'clock more than 5:30, closer to six o'clock?

A. It's possible.

Q. What was the first thing that you showed this individual when he came into your store?

A. The bedding back where he was standing at the door when I came in, which is where the bedding is at.

Q. Do you recall telling Officer Neil that the first place you went was to the stove room?

A. No, sir, first place I went after leaving the bedding was up by some couches.

Q. Did this individual seem to be paying attention to what you were showing him?

A. Yes, sir.

Q. Did he inquire?

A. Yes, sir, he was looking at the best ones I had in the store.

Q. Did he inquire about price or quality or anything of these sorts which is the normal, I assume the normal for furniture store?

A. No, sir, he didn't.

Q. What did he ask?

A. He just looked at them and as I usually advise my customers on rental that it isn't a good idea to buy the very best because people, which I told him, people don't really take care of someone else's property.

Q. All right. The first thing you showed him was some couches and some beds?

A. Beds first because that's where I came in and that's where the bedding was, the box spring and mattresses. And then up in front, I taken him to the front of the store where the couches were.

Q. All right. As you walked through the store at that portion of the time, where was the man in relation to you? Was he walking alongside of your or in front of you or behind of you or where?

A. I don't remember.

Q. Had you ever seen him in your store before?

A. No, sir.

Q. Then would it have been natural for you to lead him through the store?

A. Most usually it would be, but since he had already made his way first from the front of the store to the back of the back door before I came in, then I believe I said the couches are up in the front, if you care to go.

Q. Do you know if he touched anything while he was looking at the couches?

A. No, sir.

Q. Do you know that he didn't?

A. I don't know that he didn't.

Q. All right. Do you recall what your description to Officer Neil was as far as this man's face was concerned?

A. I don't remember, no, sir.

Q. Do you remember whether or not the man had glasses on?

A. He did not have glasses on.

Q. Do you recall Officer Neil asking you the question whether or not this man wore glasses?

A. I don't recall.

Q. Was your answer that he did not wear glasses?

A. He did not wear glasses.

Q. All right. Now the statement we're talking about was taken when in relation to the events of that afternoon?

A. That after my husband had been taken to the emergency room.

Q. In fact, this statement was taken while your husband was at the emergency room.

A. Either at or en route, but I was still being held at the store.

Q. Immediately after the event is when this statement that we are referring to was taken?

A. Yes.

Q. All right. Do you recall Officer Neil asking the following question which is from the statement on Page 6: "Question: Uh-huh, how about glasses? Did he wear glasses, do you remember?"

"Answer: I don't remember." Was that your answer at that time?

A. Again, I will have to say I don't remember what my answer was that night. I was more or less in a state of shock.

Q. Okay. But today, assuming this is a correct transcription, you're saying that he did not wear glasses; but at that time, you didn't remember, which was immediately after the event?

A. Right.

Q. All right. Do you recall Officer Neil asking you about his general build?

A. I recall him asking me and I couldn't describe it.

Q. Let me ask you if you remember these questions and answers again coming from the statement you gave to the officers that night.

Question: "Uh-huh. Was he neat in his appearance, clean-looking, clean-shaven?"

Answer: "As far as I can remember, yes, sir."

Question: "Did he talk with any kind of brogue or accent or anything like this?"

Answer: "No, sir; no, sir."

Question: "How about his facial features. Do you remember anything about it? Was it a slender face or a fat face, or—"

Answer: "I believe it was a fat face."

Question: "Kind of?"

Answer: "He himself was a heavyset man."

Do you recall that series of questions and answers?

A. Yes, sir.

Q. All right, at that time, did you describe the assailant as heavyset man?

A. Possible; yes, sir, I believe I did.

Q. Do you recall whether or not you were asked how tall the man was?

A. Yes, sir.

Q. Do you remember what your answer to that was?

A. I says taller than I am but exactly I couldn't say.

Q. Again reading from the same statement, do you recall this question? "Question: How old of a person do you think he is? I know it's hard to tell, but if you just make a guess for me.

"Answer: I would say approximately in his maybe early forties or late thirties.

"Question: Forty? And about how tall do you think he was?

"Answer: Well, he—

"Question: I am—

"Answer: I would say he is about my height, which is five six."

Do you recall giving those answers?

A. I don't recall that, but I do recall giving the age of either early—late thirties or early forties.

Q. Today you're saying your description of the man was that he was taller than you are; but that on this statement you said that he was about your height, is that correct?

A. As I said, I was in a state of shock. I can't remember exactly what I said that night.

Q. Okay, that's understandable. Do you recall being asked about his weight or general size?

A. I don't recall it.

Q. Do you recall responding that he was heavy, that he was around 200 pounds or over?

A. I don't recall.

Q. Have you had an opportunity since the time that you gave this statement to Officer Neil to read over a transcript of it?

A. No, sir.

Q. Has this transcript been discussed with you by the State Attorney's Office?

A. No, sir.

Q. Okay. Do you remember this question: "Do you think that if you saw this person again, you could identify him, say, out of a possible (it is not audible)"—apparently the machine was not audible—do you remember that question being asked to you at that time?

A. Yes, sir, I do.

Q. Do you recall what you answer was?

A. I don't.

Q. Was your answer: "I would try, I would try; I might—I don't know. He did say that Jim owed him I don't know what. We don't owe anyone like that."

A. As I said, I don't remember my answer.

Q. Do you remember anything that you gave as an answer on this report?

A. I remember saying that he did say that we owed him, and I asked him what for and I would gladly pay him if I owed him.

Q. But I am talking specifically now about questions which were asked to you by the officer immediately after this event took. Do you recall what your answers were at that time?

A. I don't.

Q. Okay. After this man pulled a gun on you—I know it may sound ridiculous, but were you scared?

A. Yes.

Q. Were you too scared to look or know what was actually going on around you?

A. I was.

Q. Didn't you, or haven't you in the past made the statement that identification would be hard because at one point put your hands over your face and began to pray?

A. I did make that statement.

Q. Do you recall telling Officer Neil that you were too scared to look?

A. Yes, sir.

Q. I can certainly understand this. Again, it is not an attempt to pick on you but to make sure that—

MR. McDANIEL: Your Honor, I appreciate the argument, but I'd rather he ask questions than argue.

MR. GOODWILL: I don't believe I was arguing.

THE COURT: I don't think it was out of line. Go ahead, sir.

Q. Did you describe the gun to Officer Neil?

A. No, sir.

Q. Did you tell Officer Neil of the attempted perversion that the man tried to make you commit?

A. I don't recall.

Q. Is it possible that you didn't?

A. It's possible I didn't.

Q. If you didn't, can you tell me why you would not?

A. If I didn't, I would say it was because I was in such a state of shock that everything didn't come to my mind.

Q. Now you say when Phillip came in, was the door open or shut?

A. It was shut. Phillip pushed the door open.

Q. Do you recall telling Officer Neil that the door was open when Phillip came in?

A. No, sir.

Q. After Phillip had been apparently shot, was your testimony that you called someone on the phone, on the telephone?

A. I dialed the operator.

Q. Okay. What did you say to her?

A. I gave her my name, address, told her what had happened and please call the sheriff's office for me.

Q. All right, then what did you do?

A. After that I called my sister, Mrs. Fulgrave, told her what had happened, and that I needed her. And I called my pastor.

Q. And is it correct, say, that at this time your husband was still laying outside in the rain and you had not gone to him at this point?

A. I had gone to him and then went back to the phone to call them. I went to him to check to see if he was still alive or not.

Q. Did you tell Officer Neil this?

A. I don't recall.

Q. Do you recall whether or not you told Officer Neil that you called your sister and your pastor?

A. I did tell him that I called my sister and my pastor.

Q. Are you absolutely certain of that?

A. Yes, sir, they were there when he arrived.

Q. During the time that he was taking this statement you told him this? You told him that you called your sister and your pastor.

A. Yes, sir.

Q. Do you recall Officer Neil asking the following questions and the following responses being given by you?

MR. McDANIEL: What page are you on?

MR. GOODWILL: Page 4.

Q. "Question: Uh-huh. How many shots were fired, do you know?

"Answer: One, one at my husband, two I know at Phillip at the back door, and I don't know how many after they left here, because I came back inside, dialed the operator, give my address, and told her there was a shooting and a holdup here, and for her to please call the sheriff's office.

Question: Uh-huh. What happened after that?"—excuse me—"What happened after then?

"Answer: I went back out to stay with Jim until help came." Is that correct?

A. That's correct.

Q. How long did you say this man was in the store total time?

A. Approximately ten minutes more or less.

Q. Well, more or less?

A. Well, when you are in a state of shock, you're not watching your watch or clock.

Q. No, ma'am, I am asking you now to tell me, if you can, as precisely as you can, how long this man was in the store.

A. Ten minutes.

Q. Now this includes both times he was in the store?

A. I can't remember distinctly.

Q. Okay. Could it have been longer?

A. It could have been.

Q. All right. Didn't you, in fact, tell the police officer that he, the man came in and you showed him the sofas and the bedding and then he left?

A. Yes, sir.

Q. All right, when he left, what did he say, if anything?

A. That his wife would be back, would be in later.

Q. All right. And then what did you do?

A. I turned to go back to my desk.

Q. All right, and how long was it before you saw him the next time?

A. He came right back in.

Q. Immediately?

A. Yes, sir.

* * *

Q. Did you watch him at all times he was in that room?

A. No, sir, I did not.

Q. Okay. So at this point, there was really no cause for alarm?

A. No, sir.

Q. As far as you were concerned?

A. No, sir.

* * *

Q. All right, ma'am. Do you recall coming into my office in Bartow back in October and my taking your deposition?

A. Yes, sir.

Q. Okay. Do you recall me asking you how the man was dressed at that time?

A. I do.

Q. I am talking about the time we took the deposition.

A. I do.

Q. You remember me asking that question?

A. Yes, sir.

Q. Do you recall what your answer was?

A. I told you I couldn't tell you the color of his clothes, but he had on this pullover—

MR. McDANIEL: Just a minute. The proper way to do it on a deposition is for Mr. Goodwill to read the question and the answer and ask if she made that response to that question. I'd like to have the page number when you do it.

THE COURT: For impeachment purposes it is proper, but I think this particular question was proper. I'm not sure it's impeachment. I want to know what conflicting statements he has got.

MR. GOODWILL: I am not.

THE COURT: You see what I mean? The only purpose of putting that in is if there is contradictory testimony today.

MR. GOODWILL: Yes, sir.

THE COURT: Otherwise she's just testifying to what she said, the same thing twice. I will allow your questions. Go ahead, sir.

Q. All right, sir. Do you recall me asking you on that at that time how tall he was?

A. Yes, sir, I do.

Q. Do you recall your answer?

A. No, sir, not precisely.

THE COURT: Now, sir, you may read your question and your answer.

MR. GOODWILL: Thank you. That's what I intended to do. Again, we are still on Page 3.

MR. McDANIEL: Okay.

Q. "Question: From his physical appearance, was he light or dark-skinned?

"Answer: Dark-skinned.

"Question: Okay.

"Answer: And I will say somewhere around five eight, maybe six foot tall; precisely I can't say." All right, this is different than what you told Officer Neil, isn't it?

A. Yes, sir.

Q. Did your memory get better or what accounts for the difference in the height description?

A. Well, as I said, that night I was in a state of shock.

Q. Wouldn't it also be true at that time that the image of this man would have been more vivid in your mind?

A. No, sir.

Q. Okay.

A. As anyone comes out of a state of shock, their memory gets more vivid.

Q. Approximately two months later, you are better able to make a description of the man than you were an hour after it occurred?

MR. McDANIEL: Your Honor, he is arguing to the witness now.

THE COURT: Yes, sir. The objection will be sustained.

Q. You were in a state of shock at the time of the preliminary hearing?

A. I was.

Q. But you made an identification then, didn't you?

A. I did.

Q. Now you're telling me a minute ago that the possible change or difference in the description between what you told Officer Neil and what you told me on deposition was because you were in shock, is that correct? This is understandable.

A. Right.

Q. But likewise, at the preliminary hearing, you have also told me you were in shock.

A. Still in a state of shock, but not as much as the night it happened. This was the day after the funeral.

Q. How many black men were in the room at the time of the preliminary hearing?

A. I don't recall.

Q. Do you recall seeing anyone in that room at the preliminary hearing other than this man right here?

A. I recall other people being there, but I can't say whether they were black or white.

Q. You said a few minutes ago you remembered Mr. Mars, is that correct?

A. As I said, I remember faces, but not names.

Q. The assistant State attorney.

A. Yes.

Q. Perhaps this is the way he was introduced to him. Do you remember him?

A. Yes, sir.

Q. Do you feel you could identify him from the preliminary hearing?

A. I think so.

Q. What about Mr. Hill?

A. Yes, sir.

Q. Your sister was with you at the preliminary hearing too?

A. My sister was with me.

Q. But you don't know whether or not there was another black man present in the room at the time you made the identification at the preliminary hearing?

A. No, sir, I don't.

Q. Do you remember Mr. Hill?

A. Yes, sir.

Q. The assistant public defender?

A. (Nods head.)

Q. Do you recall there being any black man sitting next to Mr. Hill other than this man right here?

A. No, sir.

Q. Do you recall Mr. Mars going to anyone else in the room, any other black man in the room, and asking if that was the person?

A. No, sir.

Q. So, at the preliminary hearing, this man was sitting at the defense table with Mr. Hill, and this is the man that Mr. Mars went to?

A. I don't recall him going to him.

Q. Then how did you identify him?

A. I looked at his face.

Q. Do you remember what questions were asked of you?

A. If the man was in the room who killed by husband.

Q. All right. Were you on a witness stand like you are now?

A. I was.

Q. Is this man sitting approximately the same as he is now relative?

A. He was sitting on the opposite side of the table of his attorney.

Q. All right. I mean, basically, from where you were sitting and looked out. Wasn't this pretty much the same arrangement?

A. Yes, sir.

Q. As the preliminary hearing?

A. Yes, sir.

Q. Do you remember seeing this man right here at the preliminary hearing?

A. He was sitting back close to where my sister sat.

Q. Okay. Now, we have gone through about five or six people that you do remember there, and you do remember this man being there. But, again, I ask you, do you remember whether or not there was another black person in that room?

A. No, sir.

MR. McDANIEL: Your Honor, she has answered that question at least three times.

THE COURT: Yes, sir. Objection will be sustained as being repetitious.

Q. Did Mr. Mars in any way make any indication to this man as to whether this man was the one that killed your husband?

A. I don't recall him making an indication of it.

Q. Do you recall Mr. Mars asking you the question at the preliminary hearing—

MR. McDANIEL: Give the page number.

MR. GOODWILL: Page 7.

Q. "Can you see this man sitting here?" Do you recall that question being asked?

A. No, I don't.

Q. You don't recall him asking you that question?

A. No, I don't.

Q. Page 8. Do you recall him asking you the following question and your giving the following answers?

"Question: Is this the man that shot your husband?

"Answer: Yes, sir."

A. Yes, sir, I do.

Q. Who was he referring to when he said do you see this man sitting here or is this the man that shot your husband?

A. He was referring to the man sitting right there.

Q. How did he refer to him? Did he go up and put his hand on his shoulder and say this man?

A. I don't recall it.

Q. But he didn't indicate anyone else in that courtroom other than this man right here, did he?

A. I don't recall him pointing to him.

Q. But he did in some way through the record of what was asked in the answers that were given indicate this man here?

A. I would say yes.

Q. You say you felt a gun in your back. How did you know it was a gun?

A. I didn't really know it was a gun until I saw it.

Q. When did you see it?

A. When he reached out to close the sliding loading door.

Q. Which hand did he have the gun in?

A. At that time I would say his left hand, because he still had hold of me and reaching out this way, he had hold of this arm.

Q. All right. So one door is already closed?

A. (Nods head.)

Q. We're talking about another loading door?

A. At the end.

Q. We're not talking about the glass door, but we're talking about the loading door.

A. Right.

Q. He reached out with the hand that he had the gun in?

A. And pulled it down with the gun.

Q. With the gun?

A. With the gun.

Q. And that's the first time you knew he had a gun?

A. Yes.

Q. And did that door make any noise when it came down?

A. No, sir.

Q. None at all?

A. No, sir.

Q. Silent?

A. Silent.

Q. Was he holding you in such a vice-like grip that you could not pull away from him?

A. Not a vice-like grip, no. He had hold of my arm here.

Q. And at the time you were at the metal loading door, couldn't you have pulled away from him?

A. It's possible, but he told me to do as he says and he wouldn't hurt me. He says, "Do as I say and you won't get hurt."

Q. You admitted this was a hand gun opposed to a rifle?

A. Yes, sir.

Q. Would you show me again about how big it was?

A. Maybe about like that.

Q. It wasn't a big gun or rifle.

A. No.

Q. Okay. Except for the statement to you that "Do as I say and you won't get hurt," were there any other threats of any kind made to you? In other words, did he threaten to kill you?

A. He did not.

Q. After he had shot your husband, did he threaten to kill you?

A. No, sir.

Q. All right. So we have got both loading doors closed?

A. (Nods head.)

Q. One that you know was closed by him and one you don't know who closed.

A. I don't know.

Q. Were—but it was closed sometime after he left the store?

A. Between the time he went out and then come back in.

Q. Okay. What about the sliding door?

A. He asked for the key to lock it. I said, "There is no key to that door. I have to lock it with a stick." The lock was broke on it.

Q. And then what occurred?

A. He told me to fasten it. I picked up the stick to fasten it and he said, "Don't try anything funny."

Q. Did he have hold of your arm the whole time you were picking up the stick?

A. No, sir, he didn't.

Q. He let go of you?

A. He let go of me while I did that.

Q. The sliding glass door was open?

A. It wasn't open, it was shut. But I had to open it a little bit to put the stick on the bolt there to fasten it.

Q. Okay. Do you know if he touched that sliding glass door at any time?

A. I don't know.

Q. Did he try to see if he could lock it or anything?

A. No, sir.

MR. GOODWILL: Page 10 of the deposition, Mr. McDaniel.

Q. Mrs. Turman, do you recall me asking you the question on the deposition "How long was he in the store before he left the first time?" And your answer: "I have no idea; maybe ten or fifteen minutes."

A. Yes, sir.

Q. Is that—to that question, would that be your answer today?

A. I say ten, fifteen.

Q. Before he left the first time?

A. No, I was combining the whole.

Q. All right. Again, the question was, "How long was he in the store before he left the first time?"

Answer: I have no idea; maybe ten or fifteen minutes."

A. I am sorry. I must have misunderstood your question that day; but I thought you meant the entire time.

Q. Okay. Do you know what color the gun was?

A. It was dark. It was not a shiny gun, that's all I can say. I don't know guns. I don't know one gun from another. I don't know calibers or anything.

MR. GOODWILL: Page 11, Mr. McDaniel.

Q. Do you recall me asking you the question "Can you describe the gun to me?"

Answer: "No, sir, I can't."

Question: "What color was it?"

Answer: "I don't know, I was too scared to notice."

A. Yes, sir, I do recall that question.

Q. And that answer?

A. And that answer.

Q. Well, then, the obvious question is, do you know the color of the gun?

MR. McDANIEL: Your Honor, that is not impeachment. She testified the gun was dark. She has not testified to the color of the gun today. That's not impeachment of her on that date. She merely told in her statement she didn't know what color the gun was. She testified today it was dark. It's not something he's entitled to impeach on that statement.

THE COURT: The Jury heard the testimony. I will let it stand. Go ahead, sir.

Q. All right. After you closed the door, the sliding glass door, you all proceeded to the back of the store?

A. I told him while we were still at the door he could have the whole store, just please leave me alone.

Q. Did you tell Officer Neil that?

A. I don't recall.

Q. Do you recall telling me that?

A. I don't recall.

Q. While you were closing the door, he was behind you?

A. No, sir, he was in front me.

Q. In front of you?

A. Yes, sir.

Q. You could see him?

A. (Nods head.)

Q. What was the lighting conditions at that particular point in the store?

A. In front of that door for a cloudy day, it was fairly light. I did have one light turned on up there.

Q. Now, as you were going to the back of the room or—excuse me—to the back of the store, where was this man?

A. He was in back of me.

Q. Did he still have a hold of you?

A. He did.

Q. Which hand, if you know?

A. I don't recall.

Q. How did he have you? Did he have you by the right arm or the left arm?

A. I can't recall going back through there.

Q. All you do know is that he did have a hold of you?

A. And the gun in my back or between my shoulders.

Q. All right. You are assuming that it was a gun.

A. Yes.

Q. Mrs. Turman, your husband came through the back door in—or did he come in the back door?

A. He did not come in the door. He started in. He opened the door and started in. He did not get in.

Q. He opened the door?

A. He opened the door.

Q. All right. Was the shot instantaneously at that point?

A. It was.

Q. Did you hear your husband coming?

A. I did not hear him coming. I saw him opening the door and I screamed "No, Jim, don't come in."

Q. That's the first that you saw him?

A. Yes.

Q. And this man shot him instantaneously?

A. Instantaneously.

Q. Over your shoulder?

A. Over my right shoulder.

Q. At any time, did you observe this individual with gloves on?

A. No, sir.

Q. And after he shot, did you see Phillip actually get shot?

A. I did.

Q. You saw something to indicate that he was in fact hit?

A. I did, in the face.

Q. Okay. At that point, did this individual leave?

A. He ran across the yard.

Q. And that day you never saw him again?

A. I never.

Q. Okay. You know how he left?

A. I do not.

Q. How did you get the money?

A. He told me to open the cash register and I did.

Q. Did he have a hold of you at this point?

A. No, sir.

Q. Where were his hands?

A. He was standing there with the gun pointing toward me and told me to open it.

Q. Was this on the counter, the cash register on the counter or anything?

A. No, sir, it wasn't. I had a dresser base there which I had my cash register sitting on.

Q. Did you see how this man left the scene?

A. I did not.

Q. Did you see any cars parked around your store?

A. No, sir.

Q. Although you haven't read any papers or looked at any papers, you did discuss newspaper articles with other people, didn't you?

A. No, sir.

Q. Didn't you discuss it with a friend of yours named Mrs. Poe?

A. She may—she just mentioned it to me, and I told her that I had not looked at a paper, that I couldn't read it.

Q. Did she mention that she had seen a picture of the man that they had caught?

A. She did.

Q. Okay. But you did not look at the paper?

A. I did not look at the paper.

Q. You did not see the person?

A. I did not look at the paper.

MR. GOODWILL: Excuse me just a minute, Your Honor.

THE COURT: Yes, sir.

Q. This may be repetitious. Did I ask you if you saw any cars parked around?

A. You asked me.

Q. I did? What was your answer to that?

A. I did not.

Q. Do you recall telling anyone that you saw a black car?

A. No, sir, I don't.

MR. GOODWILL: Page 4 of Officer Neil's statement.

MR. McDANIEL: All right.

Q. Do you recall the question being asked to you by Officer Neil, the officer that talked to you immediately after this occurred, "Did you see a car out front or anything?"

Answer: "I saw a car. I don't know if it was the one he was in or not, but it was out there at the corner of the building."

Question: "Uh-huh."

Answer: "The next time I looked, it was gone. That's all I know."

Question: "Can you describe this car to me in any way?"

Answer: "No, sir."

Question: "You don't?"

Answer: "I can't."

Question: "Uh-huh. Don't know what color it was?"

Answer: "No sir."

Question: "Uh-huh."

Answer: "I thought it was a black, I'm not sure."

Question: "Dark color?"

Answer: "It's a dark color, that's all I know."

A. I don't recall that.

Q. You don't recall saying that to Officer Neil?

A. I do not recall that, no, sir.

Q. At this time do you recall whether or not you saw a car?

A. I do not recall seeing a car.

MR. GOODWILL: May I have a moment, Your Honor?

THE COURT: Yes, sir.

MR. GOODWILL: I have no further questions of Mrs. Turman. I appreciate your answers. Thank you, ma'am.

THE COURT: All right, Mr. McDaniel, do you have redirect?

MR. McDANIEL: Yes, sir. I'd like to have a recess.

THE COURT: All right, we will be in recess for a few minutes.

(There was a brief recess and Court reconvened with same appearances.)

REDIRECT EXAMINATION

BY MR. McDANIEL:

* * *

Q. . . . This morning you told me that Mr. Darden has grown his goatee.

A. Yes, sir.

Q. Allowed his hair to grow some since September the 8th?

A. Yes, sir.

Q. Would you look at his physical build and tell me whether there is any difference in it at this time.

A. Sitting down I can't really tell, but I can see the face.

THE COURT: Would the Defendant stand up?

(The Defendant stood.)

A. Yes, sir, he has lost some weight.

THE COURT: You may sit down.

(The Defendant was seated.)

Q. He has lost some weight?

A. Yes, sir.

Q. Mrs. Turman, the man—the pants he had on that night, were they as baggy as the pants he has on today?

A. I don't know—no, sir, I believe they were more tight-fitting.

* * *

Q. You told Mr. Goodwill that you had your hands over your face, is that correct?

A. Part of the time.

Q. Did you have your hands over your face when you were showing Mr. Darden the furniture in the store?

A. No, sir.

Q. Did you have your hands over your face when he had you backed up to the refrigerator with the gun when he took the money out of the cash register?

A. No, sir.

Q. Did you have your hands over your face when you saw Mr. Darden shoot the boy in the face?

A. That is one time—after he had shot him—that I did throw my hands over my face.

Q. All right. In the little room four or five feet from your husband's body, when Mr. Darden was attempting to force you to have perverted act, or commit a perversion or perverted act, did you have your hands over your face at that time?

A. No, sir.

.

Q. At the preliminary hearing—Mrs. Turman, let me ask you this question: Mrs. Turman, is this the man here that murdered your husband on September the 8th, 1973?

A. Yes, sir.

Q. This is the man here?

A. Yes, sir.

Q. Did I point to somebody when I said that?

A. You did not.

Q. You were questioned by Mr. Goodwill, do you recall whether Mr. Mars did as Mr. Goodwill did, pointed at him? Do you recall Mr. Mars doing that?

A. No, sir.

Q. Do you recall Mr. Mars going over, putting his hand on Mr. Darden?

A. No, sir.

Q. Was this in a courtroom, this preliminary hearing was being held in?

A. Yes, sir, a small one.

Q. A small courtroom?

Q. Was there a Judge there?

A. Yes, sir.

Q. Were there other people around the Judge?

A. I believe there was a clerk sitting down in front of me.

Q. Were there other people in the room?

A. There were a few other people in the room.

Q. All right. You don't recall whether there was another black man at that time or not?

A. I do not.

Q. At what point in time in that room did you recognize this Defendant as being the one that murdered your husband?

A. When I came in, I saw his face.

Q. Were you on the stand at that time?

A. I was on my way up to the stand.

Q. Had anyone questioned you at that time?

A. No, sir.

Q. Had Mr. Mars said anything to you at that time?

A. No, sir.

Q. Had anyone said anything to you at that time?

A. Nobody.

Q. You're telling the Jury that you recognized that man as being the one who murdered your husband before you ever reached the stand?

A. Yes, sir.

.

Q. Mrs. Turman, after all of the examination this morning and cross-examination by Mr. Goodwill, can you look at that Defendant beyond and to the exclusion of all doubt and say that he is the one that murdered your husband?

A. I can.

Q. Is he the one that robbed you?

A. Yes, sir.

Q. He is the one that shot Phillip?

A. Yes, sir.

Q. Is he the one that attempted the act on you?

A. He is.

MR. McDANIEL: No further questions.

THE COURT: Recross, Mr. Goodwill.

MR. GOODWILL: Yes, sir, just a second.

RECROSS-EXAMINATION

BY MR. GOODWILL:

Q. Mrs. Turman, just a couple of questions. At that preliminary hearing that Mr. McDaniel and I both have been talking about, in your mind was there any question who Mr. Mars was referring to when he asked the question, "Is that the man that killed your husband?"

A. No. There was no doubt in my mind.

Q. As to who he was referring to?

A. Right.

Q. Prior to that preliminary hearing, had you been requested by any police officers or anyone from the State Attorney's Office to view a lineup or to take a look at this person to see if you could identify the man?

A. I had been requested to come down the day of the funeral. They didn't know that was the day of the funeral. They said that they would postpone it until the next day, so this is when I did go down.

Q. That was the purpose of the preliminary hearing?

A. Yes, sir.

Q. But to your knowledge, you were never requested—

A. No, sir.

Q. —to go down to a lineup?

A. No, sir.

Q. All right.

MR. GOODWILL: All right, no further questions.

MR. McDANIEL: I have no further questions.

THE COURT: All right, Mrs. Turman, you may step down.

(Witness excused.)

. . . .

[VI; 428-501]

[TESTIMONY OF PHILLIP ARNOLD]

PHILLIP ARNOLD, having been produced as a witness on behalf of the State, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McDANIEL:

. . . .

Q. Did something happen on that evening, that day [September 8, 1973]?

A. Yes, sir.

Q. Would you tell the Jury what it was?

A. That was the day that Mr. Turman was killed that I was shot.

Q. Do you recall what day of the week it was?

A. It was on a Saturday.

. . . .

Q. Tell the Jury what you remember happening.

A. Well, I was sitting out on the front porch of my house, and my mother come out and told me that my dad—something had happened to Mr. Turman. She didn't say what it was, and for me to go help Mrs. Turman. So I run across, out the front door, run across my sister's front yard, down to the front drive. And then I run down the dirt road to the back. And then—

Q. All right. Would you step down and show the Jury your house the best you can.

(Witness left the stand.)

A. Okay. My house was right here. My sister was right here. And I run across her front yard to the drive here, and then I run down the dirt road like this and over to the back of the store.

Q. All right. How far would you say down the dirt road we're talking about?

A. I'd say approximately a hundred and fifty to 200 feet.

Q. All right. About what time was this?

A. It was around six o'clock.

(The witness returned to the witness stand.)

Q. P.M. or A.M.?

A. Well—

Q. Afternoon or morning?

A. Afternoon.

Q. All right. What was the weather condition?

A. It was still daylight, but it was a little cloudy.

Q. What did you find—what happened when you arrived at the back door?

A. Well, when I got to the back door, Mr. Turman was laying there with his feet partially up in the store, and his body was laying down in the water on the ground, and his head was bleeding real bad and all. And so then I reached—

Q. You say his head was bleeding real bad? Could you tell where it was bleeding from?

A. Right on his forehead.

Q. Could you tell the Jury—I know you are pointing, but we have a court reporter, and we have no way to indicate. You will have to tell me where you are pointing.

A. Right above the—kind of close to the right eye up on the forehead.

Q. All right. Was he face down or face up?

A. He was face up.

Q. You said his feet were inside the store?

A. Yes, sir, one foot was laying in the door and the other was up against the wall.

Q. Inside wall or outside wall?

A. Outside wall.

Q. What was the position of the door?

A. It was closed against his foot.

Q. Is there a screen door?

A. No, sir.

Q. Just the one door?

A. Yes, sir.

Q. All right, what happened then?

A. Well, I reached over Mr. Turman's body and pushed the door open.

Q. Were you standing at that time?

A. Yes, sir.

Q. All right, then what happened?

A. Well, I looked in the store, and Mrs. Turman and this man were standing about middle-ways of the store, more toward the front. And so I asked him to come help me get him up out of the water.

Q. Did either Mrs. Turman or this man say anything to you at that time?

A. Well, first, Mrs. Turman waved her hand at me and told me, "Phillip, go back."

Q. What do you mean, waved her hand?

A. Just like that, said, "Phillip, go back," like that, but I didn't know what she was talking about, so I didn't do nothing. So then I asked him to come help me get him out of the water.

Q. Did he respond to you?

A. He said yes or something to the effect, yes, sure, buddy, I will help you, like that.

Q. All right.

A. So then I squatted back down. I was squatted down over Mr. Turman. And then I looked back up, and the guy was standing there in front of me. And then I looked down to his hand, and he had a gun. And before I could say anything, he started shooting me.

Q. Let's go back now, son. You say you were kneeled down over Mr. Turman?

A. Yes, sir.

Q. You say kneeled, or how were you physically? Come down and show the Jury how you were over the man, over the body.

(Witness left the witness stand.)

A. Okay, I was squatted down just like this over Mr. Turman. His feet were up here, and his head was right here. The door was there, and I was squatted down just like this.

- Q. All right. I want you to stay there.
 A. Okay.
 Q. All right, you said that—did you squat down before you pushed the door open at all?
 A. Just for a second.
 Q. And then you said you stood up and pushed the door open?
 A. Yes.
 Q. And that's when you saw Mrs. Turman and the man inside the store?
 A. Yes, sir.
 Q. And she told you to go back?
 A. She said, "Phillip, go back."
 Q. And you asked him to help you do what?
 A. Get him up out of the water. His head and all was laying in the water.
 Q. He said sure, buddy, I'll help you?
 A. Yes, sir.
 Q. You did what then at that point?
 A. Well, I looked back down at Mr. Turman to see if he was breathing or anything for a minute. And when I looked back up—
 Q. How were you when you looked at him to see if he was breathing, like you are now?
 A. Yes, sir. I never got out of this position right here from looking up. I looked back down like that.
 Q. Then what happened?
 A. Then when I looked back up in the door, he was standing in the door; and when I looked down to his hand, and he a gun.
 Q. Where did you look first?
 A. Up at his face.
 Q. And then you looked down?
 A. Yes, sir.
 Q. You saw the gun?
 A. Yes, sir.
 Q. What was the first thing happened then?
 A. He pulled the trigger.
 Q. And what happened?
 A. It clicked.

- Q. What did you do then?
 A. At first, my mind just went blank and I wouldn't, I couldn't think of nothing. I was going to beg him not to shoot me, but I didn't have time. He pulled it again and he shot me.
 Q. All right. Where did he shoot you that time?
 A. In the mouth.
 Q. Show the jury where he shot you in the mouth.
 A. Right here.
 Q. Did that bullet come out?
 A. Not then it didn't; the took it out in the hospital.
 Q. Did they take anything else out at that time?
 A. They took a piece of bone and teeth out.
 Q. All right. Then what happened?
 A. Well, after he shot me in the mouth the first time, I started to start running and he shot me in the neck.
 Q. Did you get all the way up before he shot you in the neck?
 A. No, sir.
 Q. Show approximately how far you think you got up?
 A. Well, I can't be sure exactly. I was approximately something like this, partially standing up.
 Q. And he shot you in the neck.
 A. Yes, sir.
 Q. What happened to that bullet?
 A. It is still in there.
 Q. All right. Show the jury where the second bullet went?
 A. It's right there. You can see the scar.
 Q. Turn around and show the jury where all of the jury can see.
 All right, what happened?
 A. Then as I started to run across the yard I was running at an angle from the door, and he shot me in the side, and it come out at my shoulder.
 Q. Do you know whether or not this man was chasing you at this time or whether he shot you from the door?
 A. No, sir, I don't know.

Q. Did you ever look back?

A. No, sir.

.

Q. Phillip, when you were there at the back door looking at this man with a gun in your face, can you describe the lighting conditions? You have already described them outside, inside now.

A. Well, inside the door, just inside the door they have a light bulb and it was on. Then over the desk that stays right near the front part, there is a fluorescent light which stays on, and then there is one half way down the hall way which also stays lit.

Q. Did you have any problem seeing the man?

A. No, sir.

Q. All right. Can you describe him for the jury at that time?

A. Well, he was a heavy set man, black, he was, his hair was neat and short, had a long face.

Q. Did you notice his clothing?

A. Yes, he had a dark colored pants and he had on a short sleeve knit sport shirt, it was a dull light color and had a ring around the collar on the neck of it.

Q. Can you describe the gun that was in your face?

A. The only thing I noticed about it was, it was just a small revolver.

Q. Could you tell what color it was?

A. No, sir.

Q. Could you tell whether it was dark, silver or dark?

A. No, sir.

Q. Are you sure it was a revolver?

A. Yes, sir.

Q. All right. Phillip, can you at this time point to the man who shot you?

THE COURT: Wait just a minute if you would. At this point in order to properly hear objection and perhaps take some testimony, I will excuse the jury for a few minutes.

Will everyone stand while the jury leaves the courtroom.

(The jury left the courtroom.)

(JURY OUT)

THE COURT: Will every one be seated.

Mr. Goodwill, do you have objection you wish to make, if not specific questions at least. I assume, sir, you are going into an identification procedure.

MR. McDANIEL: You may assume, yes, sir.

THE COURT: Yes, sir.

MR. GOODWILL: Yes, sir, some of the argument will be handled by Mr. Maloney, my co-counsel.

The Court file reflects that on September the 10th, 1973, at First Appearance Hearing held in Polk County, that the defendant was determined to be indigent and the Public Defender was appointed to represent him at that time.

Subsequent to that time—

THE COURT: Not the Preliminary Hearing this was a First Appearance?

MR. GOODWILL: A First Appearance Hearing, the man was already in custody, had been arrested and charged and was at First Appearance Hearing.

THE COURT: Mr. Williams, is there a First Appearance Hearing Order in the file, sir?

CLERK: Yes, sir.

THE COURT: What was the date of it?

CLERK: 9-10-73, sir.

THE COURT: All right, sir.

MR. GOODWILL: All right, sir, on the 11th—

CLERK: It was the order of 9-9-, but it was held on 9-10, sir.

THE COURT: The Public Defender was appointed to represent him?

CLERK: Yes.

THE COURT: Carry on.

MR. GOODWILL: On the 11th of September, according to Mr. Arnold's deposition and information which

we have gathered from other sources, a series of six pictures was shown to this young man.

THE COURT: All right, sir, in order that I can have the proper situation I wish either you or counsel for the State, one or the other, would interrogate.

MR. GOODWILL: All right. Would you prefer it in that manner?

THE COURT: Yes, sir.

EXAMINATION

BY MR. GOODWILL:

Q. Phillip, while you were in the Lakeland hospital did any officers of the Polk County Sheriff's Department come to see you?

A. Yes, sir.

Q. Do you remember when that was?

A. It was about the second day I was in there.

Q. Do you remember the date?

A. No, sir, I don't.

Q. At that time did they show you a series of pictures?

A. Yes, sir.

Q. Do you remember the names of the officers that were present?

A. No, sir.

Q. At that time were you able to speak?

A. A little.

Q. In response to—Did they ask you any questions?

A. Yes, sir.

Q. All right. Did they ask you to answer their questions verbally or write the answers out?

A. I answered most of them verbally.

Q. Did you write your answers out?

A. Yes, sir.

Q. So you were able to speak?

A. Yes, sir.

Q. At that time?

A. (Nods head.)

Q. Of the photographs which you were shown, first of all, were they all colored, were they all black?

A. Yes, sir.

Q. All right. In all other respects—

THE COURT: The pictures themselves.

MR. GOODWILL: The pictures.

THE COURT: Were they black and white or were they colored pictures, sir?

A. They were black and white.

Q. All right. What were these pictures of, just in general?

A. Men.

Q. Just men?

A. (Nods head.)

Q. Did they all look similar?

A. Not all of them.

Q. Were you able to disregard any of the pictures immediately?

A. Yes, sir.

Q. Did you identify a pictures, of the six, what did the officers tell you the purpose of looking at the pictures was?

A. To identify the person that shot me and Mr. Turman.

Q. Did they say if you could or to identify from these pictures the one that did it?

A. They asked me if any of the people in the photographs looked like him.

Q. OK. Of the six did any appear to look like him?

A. Yes.

Q. Did more than one appear to look like him?

A. Not exactly.

Q. Was there a similarity?

A. It was a slight similarity, just slight.

Q. All right.

MR. GOODWILL: Your Honor, I am not sure on this particular procedure, I am in a cross-examination situation or not; I feel that I am.

THE COURT: Yes, sir.

MR. GOODWILL: I would want to lead.

THE COURT: What I want to do is do this as expeditiously as possible and get to the facts.

MR. GOODWILL: All right, sir, that's why I would like to go ahead and lead this witness.

Q. Isn't it true that you pictures and said that both of these men looked sort of like him?

A. Yes, sir.

Q. And isn't it true that you just automatically excluded four of them right away?

A. Yes, sir.

Q. And isn't it true that the reason you excluded him you—

THE COURT: Let him give his own answers.

Why did you discount the other four?

MR. GOODWILL: That's what I was about to ask him.

THE COURT: You were about to tell him and let him agree to it. I would rather have him tell.

Q. Why did you discount the other four?

A. Well, they were either too young or just real small, they just didn't fit the appearance at all.

Q. They just didn't look like him at all?

A. No, sir.

Q. So out of the total of six there were only two of them that really were even a close portrayal of the man you identified. Is that correct?

A. Yes, sir.

Q. Did you notice on the pictures whether or not there were any names?

A. No, sir, there were no names.

Q. There were no names on the photographs?

A. No, sir.

Q. You ultimately identified a photograph of Mr. Darden. Is that correct?

A. Yes, sir.

Q. And do you recall whether or not his name was on that photograph?

A. No, sir, it wasn't on the photograph.

Q. You are absolutely positive of this?

A. Yes, sir.

Q. Was there a date on the photographs?

I am talking about, I assume this was a picture of the man standing face forward and from the side; is this correct?

A. Just face forward.

Q. Just face forward?

A. Yes, sir.

Q. There was no picture of him standing from the side?

A. No, sir.

Q. All right. In the face forward was there anything other than his clothes in front of him in the picture?

A. There was a plate that identified as the Polk County Sheriff's Department and then it had numbers under it.

Q. All right. Do you remember the number 9973?

A. No, sir.

Q. Do you remember being a small white tag on the left side of the photograph of Mr. Darden that said Darden?

A. No, sir.

Q. I am going to hand you six photographs—

THE COURT: Would you mark them for identification, please, Todd?

MR. GOODWILL: Yes, sir.

[Photographs were marked for identification]

Q. While they are marking the pictures, do you remember what day of the week the officers came to see you?

A. No, sir, I couldn't say for sure.

Q. Do you recall telling me on deposition that it was about the third day after I was in there, second or third day after I was in there?

A. Yes, sir.

Q. Do you remember whether it was Monday or Tuesday?

A. No, sir.

Q. Got shot on Saturday. Is that correct?

A. Yes, sir.

Q. All right. And what were you counting as the first day?

A. Well, I was counting Sunday as the first day.

Q. OK. So it was either Monday or Tuesday that they came to see you?

A. Yes, sir.

Q. I show you six photographs marked Defendant's Exhibits number one for identification, and ask you if those were the six photographs that were shown to you by the officers that visited you in the hospital that day?

A. They appear to be, yes, sir.

Q. Well, can you give me a more definite answer.

MR. McDANIEL: Objection. He said they appear to be. That's the best he can do.

THE COURT: Yes, sir. I think he is entitled to say that's the best he can do. Objection will be overruled. Go ahead.

Q. Is that the best you can do is say they appear to be?

A. Yes, sir, I couldn't say for sure.

Q. You can't say for sure?

A. (Shakes head.)

Q. I show you a photograph marked Defendant's Exhibit Number six for identification and ask you if that photograph was shown to you?

A. Yes, sir.

Q. What does that photograph depict?

A. That's the man that shot me.

Q. OK. Is there a white tag on the front of his shirt?

A. Yes, sir.

Q. What does that white tag say?

A. Darden.

Q. Was that on there at the time the picture was shown to you in the hospital?

A. I don't really know. I didn't see it or pay any attention to it if it was.

Q. Did you exclude any of those photographs as not being the person that shot you on the basis of them not having a moustache?

A. No, sir, I don't believe so.

Q. Do you recall my taking your deposition in my office in Bartow, sir?

A. Yes, sir.

Q. Do you recall the following question and answer?

MR. WHITE: Mr. Goodwill, will you tell us what page you are on?

MR. GOODWILL: Yes, sir, page 18.

THE COURT: Are you going to attempt to impeach him at this state of the proceedings?

MR. GOODWILL: On the basis of these pictures.

MR. McDANIEL: It's not the time for impeachment purposes, Your Honor.

THE COURT: No, sir.

MR. GOODWILL: As identification of the pictures, to show that he did exclude certain pictures on certain basis because they did not fit the description he had given the police earlier.

MR. McDANIEL: Your Honor, I don't think the purpose of this examination is to impress the Court. The Court needs the facts surrounding the—

MR. GOODWILL: Mr. McDaniel, I am not trying to impress the Court.

THE COURT: All right, sir, if he has at some previous time given you a statement more detailed or different from this, for the purpose of refreshing his memory, I will allow you to ask him. Not to impeach, but for memory refreshment.

All right.

Q. Do you remember me asking you the following question: "Were there any other pictures that you saw of those six that looked similar to the man that was there that day?"

"Answer: There was one that looked a little bit like him, not much, but he had a moustache, had a small moustache and he wasn't as heavy."

Do you recall that?

A. Yes, sir.

Q. So did you exclude any of these photographs, these six that I have just showed you, on the basis that the individual depicted in the photograph had a moustache?

A. Not strictly for that reason, no, sir.

Q. Can you show which of these photographs you excluded?

A. I believe it was this one.

Q. You excluded or included?

A. I believe that's the one I excluded.

Q. You excluded this one? As not being?

A. Yes, sir.

Q. Did you exclude any more?

A. All of them except this one.

MR. McDANIEL: Which one are you talking about this one?

MR. GOODWILL: He is speaking about Defendant's Exhibit Number 6 for identification.

MR. McDANIEL: Let me see the front of that one. Thank you.

Originally, didn't you narrow it down to two photographs and then narrow it down to two?

A. I had it down to two.

Q. All right. At that point can you show me which four you excluded?

A. Yes, sir, it was this four here.

Q. These four were excluded originally?

A. Yes, sir.

Q. OK.

MR. GOODWILL: For the record the witness identified Defendant's Exhibits for identification numbers 1, 2, 3, and 4.

Q. Why did you exclude them?

A. The first four I excluded for the fact they didn't look anything at all like him. They just didn't fit the description.

Q. At all?

A. No, sir.

THE COURT: I think he has been over all of this now, how he worked on the pictures.

Q. After you got shot and before the police officers arrived, did you read any of the newspaper accounts of what had happened?

A. No, sir.

Q. Again on deposition do you recall my asking you the question, pages 21, Mr. White, "after that Saturday

did you read any of the newspapers on Sunday or Monday following the crime?"

"Answer: Yes, sir."

"Did you read about the crime?"

"Answer: Yes, sir."

"Question: Did you read that they had arrested somebody named Willie Darden?"

"Answer: I read that they had a suspect in custody, I am not sure if that gave his name or not."

Do you recall that series of questions and answers?

A. I don't recall the question about, I recall reading about the shooting itself, but nothing about any identification or such as that.

Q. You don't recall this series of questions and answers?

A. Yes, sir.

THE COURT: He remembers part of them, but not all of them.

A. Yes, sir.

THE COURT: Which is it, son, do you remember whether or not you did read the newspapers between Saturday night and the time they came and showed you the photographs or not?

A. I believe I did read about the shooting, but I didn't read anything about a suspect or somebody was picked up for that.

THE COURT: Did you see any pictures in the newspaper?

A. No, sir.

THE COURT: Go ahead, sir.

Q. Then why did you give me the answer that I read that they had a suspect in custody?

MR. McDANIEL: That's argumentative.

MR. GOODWILL: I am only trying to clarify.

THE COURT: Go ahead. I will allow it. Go ahead.

Q. Why did you give the answer: "I read that they had a suspect in custody, I am not sure if that gave his name or not."?

A. Well, they said they had a suspect, but it didn't show any pictures to say who it was, nothing to identify him by.

Q. That you recall at the time you gave this deposition.

A. Yes, sir.

Q. Is it possible that the articles did give his name or give a name?

A. No, sir.

Q. What was your physical condition at the time these officers—First of all, what time did the officers come?

A. It was in the morning.

Q. You are absolutely positive of this?

A. Yes, sir.

Q. Could it have been in the afternoon?

A. No, sir.

Q. What was your physical condition at the time that they came?

A. I don't know what you mean by that.

Q. Well, number one, you were in bed?

A. Yes, sir.

Q. All right. Was your mouth wired up?

A. No, sir.

Q. Or your face, did you have any wiring?

A. They didn't wire my mouth up until toward the end of the week.

Q. Towards the end of the week?

A. Yes, sir.

Q. Were you in any pain?

A. Not unless I tried to move.

Q. Were you in any pain if you tried to move your mouth?

A. No, sir, just stiff.

Q. It was just stiff?

A. Yes, sir.

Q. Do you know if you were on any type of medication?

A. No, sir.

Q. You don't know of your weren't?

A. I don't know for sure.

MR. GOODWILL: One moment, Your Honor.

THE COURT: All right, sir.

Phillip, did you positively identify the man in that picture at that time as being the man who shot you?

A. In the hospital, yes, sir.

THE COURT: Did you positively say, "That's the one who did it"?

A. Yes, sir.

THE COURT: The picture of him.

A. Yes, sir.

THE COURT: Did any of the deputy sheriffs—how many was there in there with you?

A. When I was in the hospital there was two.

THE COURT: All right, sir.

Q. Phillip, didn't they come to see you at five o'clock in the afternoon, on the afternoon of the 11th of September?

A. I don't believe so, no, sir.

Q. They came in the morning?

A. I believe so.

THE COURT: Do you remember what conversations you had with the deputies at the time they showed you the pictures?

A. They just asked me if I could identify him.

THE COURT: Did they tell you anything about any of the pictures?

A. No, sir, didn't tell me nothing about the pictures at all. They just showed them to me and asked me if any of them looked like the man.

THE COURT: Did they tell you where the pictures came from?

A. No, sir.

THE COURT: Did they tell you they had anybody under arrest for it?

A. No, sir.

THE COURT: Did you know they had a man under arrest at that time?

A. I may have, but I couldn't say for sure.

THE COURT: Had you talked to your parents before they came in there about the shooting?

A. Yes, sir.

THE COURT: Had they told you anything about what was going on?

A. No, sir, they didn't know nothing either.

THE COURT: And you didn't know, you strictly didn't know if they had arrested any one for this crime or not at this time?

A. No, sir.

Q. Didn't you say several things on that deposition, such as you didn't pay much attention to most of them because they didn't look anything like him.

A. Yes, sir.

Q. Did you say that?

A. Yes, sir.

MR. McDANIEL: Objection.

Q. Most were small or young.

MR. McDANIEL: We have been through this five times, Your Honor.

Q. In their twenties or slim.

MR. McDANIEL: Wait a minute. I object to all of this line of questioning.

THE COURT: Yes, sir, I think it is repetitious. He has already testified to that, Todd.

MR. GOODWILL: There were only two heavy set.

A. Well, there was one other that was heavy set, but he was way too old.

MR. GOODWILL: Your Honor, I am not trying to be repetitious on this point, except—

THE COURT: If there was some other purpose in the question, I would be glad to hear it.

MR. GOODWILL: In his deposition by repeatedly making the remark that four of these were not in any way like the individual that—

THE COURT: He has said that already today, I understand it.

Four of them were either too old or too young, too big or too small, and just nothing like it and it came down to two that were something like him.

A. Yes, sir.

THE COURT: And from those two you selected pictures of the defendant, one partially because the other man had a moustache.

A. And the other man was also younger, and wasn't as big.

Q. At the time that you were shot back near your home isn't it true that you gave the officers a fairly detailed description of the man that had shot you?

A. Well, fairly, you might call it that, yes.

Q. Didn't you describe him—page 25 of the deposition, Mr. White—as middle-aged, heavysset, black man.

MR. McDANIEL: When are you talking about, I am sorry.

MR. GOODWILL: At the scene.

MR. McDANIEL: At the time he was shot.

Q. Isn't this the description that you gave them?

A. Yes, sir.

EXAMINATION

BY MR. McDANIEL:

* * *

Q. All right, Mr. Arnold, I want you to look at this man and tell me whether or not you can identify him from the time you saw him when he blasted you in the face? Can you, think back to September 8th, 1973, forget anything else, forget the hospital, forget everything, September 8th and right now.

A. Yes, sir, that's him.

Q. Do you have any doubt whatsoever in your mind?

A. No, sir, none.

Q. Did the photographs—Are you remembering the photographs?

A. No, sir.

Q. What are you remembering?

A. The day I was shot.

Q. Are the photographs helping you in any way?

A. No, sir.

Q. Whatsoever to identify him?

A. No, sir.

Q. None whatsoever in your mind?

A. None.

Q. Has any newspaper articles—

A. No, sir.

Q. —helping you identify this defendant?

A. No, sir.

Q. Why are you identifying him?

A. Because that's the man that shot me.

Q. Because of the long cross-examination of the hospital Your Honor, I'd like to ask a couple of questions, about the hospital.

THE COURT: All right.

Q. You were shot three times in the face, in the side on September 8th. Is that correct?

A. Yes, sir.

Q. Around six p.m.?

A. Yes, sir.

Q. And you said that you didn't have your face wired up until the end of that week. Is that correct?

A. Yes, sir.

Q. Were you ever in the intensive care unit?

A. Yes, sir.

Q. Do you know when you were put in there?

A. No, sir, I don't remember.

Q. Were you in the hospital for a period of time and then they put you in there or do you know?

A. I believe they put me in the next morning.

Q. Sunday morning?

A. Yes, sir.

Q. Do you know how long you were in there?

A. Just a day or so.

Q. All right. When the two deputies came to you with these six photographs, were they black men—

A. Yes, sir.

Q. The six photographs, were they black men?

A. Yes, sir.

MR. GOODWILL: Your Honor, that's been answered, he has identified the photographs as being the photographs.

THE COURT: All right, sir.

Q. When those deputies came to you how long had you been out of the intensive care unit, do you know?

A. No, sir, I don't know.

Q. All right. You told the Court that you read some newspaper articles but you did not see a photograph.

A. No, sir.

Q. And Mr. Goodwill ask you didn't you read Sunday's paper and Monday's paper and Tuesday's paper. Do you know when you read those papers?

MR. GOODWILL: Your Honor, is he attempting to impeach his own witness.

THE COURT: It's proper examination. Objection will be overruled. Go ahead.

MR. GOODWILL: I think he is attempting to impeach his own witness.

Q. Mr. Arnold, could you have read September 9th's paper, September 9th, 1973, the following Friday?

A. It's possible.

Q. Do you know?

A. No, sir.

Q. All right. You told the Court that you did not to your knowledge see or hear this man's name before you picked this photograph out of that stack of six photographs. Is that right?

A. Yes, sir.

MR. McDANIEL: I have no further questions.

EXAMINATION

BY MR. GOODWILL:

Q. Mr. Arnold, do you know whether or not you were on any type of medication or any type of sedation?

A. No, sir.

Q. You don't know?

A. No, sir.

Q. Were you sleepy, were you tired?

A. When they first brought me in I was tired, but after I got a night's sleep I wasn't, no, sir.

Q. After that you weren't?

A. No, sir.

Q. You knew everything that was going on?

A. Yes, sir.

Q. Why couldn't you answer Mr. McDaniel's questions as to when certain events happened and when certain events did not happen?

A. I just didn't pay any attention to the dates. You know, like reading a newspaper.

THE COURT: Phillip, when was the first time that you saw the defendant here in person after this?

A. Two days ago.

THE COURT: You did not see him any time during the fall, the time of your deposition until up to this week.

A. No, sir.

THE COURT: Have you seen pictures of him in the meantime?

A. No, sir.

THE COURT: You haven't seen pictures in the newspaper or anywhere else?

A. No, sir.

THE COURT: No one has shown you any additional photographs other than the ones they showed you in the hospital?

A. No, sir.

THE COURT: All right. Anything further?

MR. McDANIEL: None from the State.

THE COURT: All right. Mr. Goodwill, we have further testimony I am going to need. Do you know which deputy, does any deputy have a specific time or date on which this photographic lineup was held?

MR. McDANIEL: Mr. Neil does, Your Honor.

MR. GOODWILL: September the 11th, 1973, at five o'clock in the afternoon.

THE COURT: Let's get him in here and put it in the record.

Phillip, you can just step out in the hall just a minute. We will call you back.

(Witness excused.)

DON NEIL, having been recalled as a witness, and having been previously sworn, testified as follows:

EXAMINATION BY THE COURT

THE COURT: Were you present at a photographic lineup on the—when it was shown to Phillip Arnold;

that is, a series of pictures including one of the Defendant?

A. Yes, sir.

THE COURT: While he was in the hospital?

A. Yes, sir.

THE COURT: Do you remember the date of it?

A. The 11th of September.

THE COURT: Of September?

A. Yes, sir.

THE COURT: What time of day?

A. Approximately 5:00 P.M.

THE COURT: All right.

A. Mr. Arnold had just come out of intensive care.

THE COURT: All right, sir. Any other questions of this witness?

MR. GOODWILL: Yes, sir, I have some questions.

THE COURT: All right, sir.

EXAMINATION

BY MR. GOODWILL:

Q. Mr. Neil, did you file a report, a supplemental report, normal supplemental report of your going to the hospital?

A. Yes, sir.

Q. Of this identification?

A. Yes, sir.

Q. Have you examined that report? Are you acquainted with the contents?

A. Yes, sir.

Q. I'm not talking about the long one; just to refresh your recollection, I am talking about this particular report.

A. Yes, I believe so.

Q. Okay. Do you feel that you can testify about its contents, based on your recollection?

A. Yes, sir.

Q. Word for word for each question generally?

A. Yes, sir.

Q. Was it in your report that Arnold was unable to speak as his mouth was wired together as a result of being shot, although he did write the answers to questions, "questions asked him by myself and Keeny. See attached paper"?

A. Yes, sir.

Q. All right. Do you have the attached paper?

A. I can produce it. It's in my file outside.

MR. McDANIEL: If you have a copy of it, I have no objection to your showing it to him.

MR. GOODWILL: Well, I may want to introduce it.

Q. Is this a true and correct copy of the written statement?

A. It appears to be, yes, sir.

Q. Is it complete, and this is his entire written statement?

A. This is the answers to the questions, yes, sir, that we asked him at the hospital.

Q. All right. This report starts on 9/11/73, 5:00 P.M. The first thing, I assume, is an answer from Mr. Arnold, "Both of these two look a little like him." What was the question, or where is the question to that answer?

A. I'm sure it needs an explanation. Officer Keeny and myself were there in the hospital room with him. We handed him the photographs and told him to study these over and be certain of his identification before he decided. And this was basically the first question there.

Q. But that does not appear on this report? Just his response to that question?

A. The response to it, right.

Q. Then I assume the question was asked, did he have a moustache, "I don't think so."

A. Yes, sir.

Q. At the bottom it says, "Right. What is displayed of the photo that you choose at this point?"

A. Yes, sir.

Q. Would you tell me what appears below that?

A. Well, on each photograph there was a, I guess you would call it a name plate with date, the agency, and in most cases, usually a number, file number. Being as he could not speak too clearly with his mouth wired shut, we asked him to write what was on the face plate, whichever photograph he chose.

Q. All right, is this what he wrote?

A. Yes, sir.

Q. And what does that say?

A. Sheriff's Department, Bartow, Florida. The number is 4644, dated 9/9/73

Q. Was that a date that appeared on the photograph?

A. Yes.

Q. All right. I show you Defendant's Exhibit No. 6 for identification, and ask you if this is the photograph of Willie Jasper Darden that you showed Mr. Arnold on that date?

A. This is not the one that I showed him. I showed him one like this.

Q. Is this an exact copy that was provided to the Public Defender's Office at the request for discovery?

A. It appears to be, yes.

Q. All right. Now, is this the face plate that you are talking about?

A. Yes.

Q. Is there any difference between what Phillip Arnold wrote here and what appears on the face plate here?

A. Only that the name Darden.

Q. All right, sir.

THE COURT: Did the photograph have Darden's name on it?

A. Yes, sir.

Q. How many of the other photographs, if you remember, had names on them?

A. One, possibly two others.

Q. Can you be sure?

A. I can be sure of one other.

Q. Do you remember who that was?

A. Myles.

Q. Do you remember any other? Well, for the purpose of clarification, are these the six pictures which were shown or copies of the six pictures that were shown?

A. Yes, sir.

Q. Except for Mr. Myles and Mr. Darden, does the name of any one of the other persons appear on the pictures?

A. Only on two of them, Myles and Darden.

MR. GOODWILL: For the purpose of the record, I showed him Defendant's Exhibit 4, No. 1 through 6 for identification.

THE COURT: Were all of these people you had some reason to believe the man who might have done the shooting, or just pictures you picked out?

A. No, sir, these were just photographs that I put with the other to eliminate any direct attention to the suspect.

THE COURT: Yes, sir.

Q. All right. Officer Neil, isn't it true at this time that Mr. Darden was under arrest and in the Polk County Jail?

A. He was.

Q. At the time these pictures were shown to Phillip Arnold?

A. Yes, sir.

Q. All right. And these pictures were shown to him on the 11th of September, is that correct?

A. Yes, sir.

Q. Have you at any time since that date contacted Phillip Arnold relative to having a lineup?

A. Physical lineup? No, sir.

Q. Of what are commonly referred to as just a lineup.

A. No, sir.

Q. To your knowledge, has been out of the hospital and has been able to attend a physical lineup if one were arranged?

A. He could have. I wasn't aware of the date of his release.

Q. But sometime in the last four months, a physical lineup could have been arranged?

A. Yes, sir.

Q. And which Mr. Arnold could have appeared and—

A. Yes, sir.

Q. —done whatever he was supposed to do?

A. Yes, sir.

THE COURT: I have enough of the facts. Do you want to argue the law?

* * * *

[VI; 482-488]

[MOTION TO SUPPRESS]

(The attorneys, the Court, the clerk, and the Defendant and the court reporter retired to the Judge's Chambers, at which time the following took place:)

(JURY OUT)

MR. MALONEY: Your Honor, I move the Court to suppress the in-court identification—

THE COURT: All right, sir.

MR. MALONEY: —which Mr. Arnold probably is going to make.

THE COURT: Which outside the presence of the jury he did make.

MR. MALONEY: He did make it.

THE COURT: All right, sir.

MR. MALONEY: I move to suppress that on due process grounds. I think that the lineup, the photo lineup which was shown to Mr. Arnold on the 11th was in violation of the 5th Amendment right "to be confronted with the witnesses against him." Clearly Mr. Darden couldn't have been in the hospital to confront the witness against him, but the record will reflect that he was represented by counsel at that time, and I believe he had a right at that time to at least have his counsel present to see the photographs to find out if they were substantially fair.

In line with the decisions of the Supreme Court in *Stovall*, *Gilbert* and *Wade* concerning photographic lineup and also in line with the later Supreme Court decisions being *Simmons vs. United States* which stated that all due process consideration which one must give one in a lineup must also be given in a photo lineup.

Regarding the point of having an attorney present, I think that although the United States Supreme Court has not ruled on the decision the Federal Appellate Courts have. I cite to the Court the *United States vs. Seiler*, 437 Federal Second 1305, Third District 1970, which stated that counsel is necessary at a photo lineup which subject or defendant is in custody.

I think it is clear that Mr. Darden not only was in custody, but he was accused of the crime of murder.

In 219 Southern Second 762, that is the decision of the Third District Court of Appeals 1969, wherein the facts being that the police took a video tape of a suspect and then after he had been appointed counsel showed his video tape to the victim of a robbery. The subsequent conviction of the defendant was reversed, the Court holding, in essence, that we believe that under the state of his record the defendant had a right to counsel at the time of confrontation, that what the police could not do directly, I think referring to a lineup, should not be allowed to do indirectly through the miracle of photographs.

I think Florida is in the minor camp on the issue where an attorney has to be present at the photo lineup if in fact the defendant had been appointed counsel. The rational I think of the case is stating that the attorney should be there if he has been appointed, that the accused is entitled to counsel at any critical stage of the prosecution. I think the critical concept was incorporated by the Supreme Court in the *Escobida* case and *Miranda* decisions. And I don't think there can be any doubt that in this particular case that the photo lineup shown to Mr. Arnold was a critical stage of the of the prosecution of Mr. Darden.

Quoting from another case that concerned a photo lineup without an attorney in which I believe was reversed on a robbery, this being *United States vs. Zelker*, I didn't get the cite on it.

THE COURT: All right. Suppose we, for the sake of argument, go along with the photographic lineup being improper because of failure to notify counsel and have him present. There has been no proffer in testimony here from the State of evidence concerning the photographic lineup; we are here on motion to suppress an in-court identification. The testimony of the witness was made not upon the photograph but upon his independent recollection of the appearance of the defendant. Have you got any cases on that?

MR. MALONEY: In United States vs. Zelken the photo identification was suppressed. The Court went on to say that since the requirements were not met in that, it went on to say the burden was on the prosecution by clear and convincing evidence the identification be based upon observations of the defendant other than at the improper confrontation.

MR. GOODWILL: Also running through the case lies the idea when there is an opportunity and time is not of the essence, which it was demonstrated by the testimony in here, that in order to correct any possible taint of photographic identification that the better procedure is to hold a lineup and thereby correct any possible problem that may have been incident to the photographic lineup.

There has been ample opportunity for a lineup. Mr. Darden, I believe at the time that he was representing himself, filed a motion for a lineup. There is no reason why this boy could not have been brought in and in the presence of counsel had a lineup. I believe, sir, if that had been done and the identification had been made at that time that whatever taint may have been created by the photographs would have been removed by what the Courts seem to refer to as a much better manner of identification.

MR. WHITE: Your Honor, if the State may respond briefly. We have not offered into evidence anything, any evidence resulting from that lineup. Mr. Arnold was there on the stand, he has already proffered to the Court "when I point to that man today I am pointing to him for one reason, my observations the night of the crime, nothing in between."

There is a case *Avis vs. State* 221 So. 2nd 235 that says—it is almost right on point—that says a victim can make in-court identification even if he viewed a lineup in which defense counsel was not present if he can get on that stand and through his own testimony say I am making this identification independent of any lineup or anything that has gone on between the night of the event and right now.

Arnold has already said that.

THE COURT: I am going to allow the in-court identification, but would not allow testimony from the State as to the photographic lineup. If the defense wishes to bring in evidence concerning the photographic lineup to destroy the weight or effect of the in-court identification, I think that would be proper, but I will cross that when I come to it.

You see what I am talking about?

MR. MALONEY: Renew the motion we made the other day on the additional grounds without elaboration. I think there was argument at the time. The photographs of Mr. Darden shown to Mr. Phillip Arnold in our opinion was the fruits of an illegal arrest and we would object to it even having been shown to him in the first place, and this further taint adds error on error, and we would object to it. And on the basis the photographs should never have been taken, the fruit of an illegal arrest.

THE COURT: Yes, sir. I personally took testimony on the motion to suppress, and I am taking judicial notice of the testimony at that time without retaking the same testimony this morning.

I will deny your motion, would allow the in-court identification, not any evidence from the State to the photographic lineup. The defense, if you wish to, in order to attack the credibility of the identification of the weight of it, may put in photographic evidence, if you want.

[VI; 489-500]

[TESTIMONY OF PHILLIP ARNOLD]

PHILLIP ARNOLD, having been recalled as a witness on behalf of the State, and having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McDANIEL:

Q. The problem that I have discussed with the Court before, I think—that I am not sure if I've asked this question. If I have, please tell me. Phillip, did I ask you to describe the lighting conditions in the building when you were facing the gun?

A. Yes, sir.

THE COURT: All right, you have described that, right?

A. Right.

Q. What is your age, Phillip?

A. 17.

Q. How old were you on September the 8th, 1973?

A. 16.

Q. Phillip, since that date, have you, on any opportunity, ever discussed this case with Mrs. Turman?

A. No, sir.

* * *

Q. Phillip, I want you to think back to the afternoon or the evening of September the 8th, 1973. I want you to remember the person that had the gun in your face. I want you to remember the person who pulled the trigger, and remember the person that shot you in the face.

A. (Nods head.)

Q. And in the back or side.

A. (Nods head.)

Q. I want you to look in the courtroom and see if you see that man today.

A. Yes, sir, the Defendant.

Q. What color shirt does he have on today?

A. Blue.

Q. That's the man at the end of the table?

A. Yes, sir.

Q. Phillip, is there any doubt whatsoever in your mind that the man you pointed to is the Defendant?

A. No, sir, none.

Q. Pardon?

A. None at all.

MR. McDANIEL: Let the record show that the witness identified the Defendant.

Your Honor, would you ask the Defendant to rise for a moment?

THE COURT: All right. Stand up, please, Mr. Darden.

(The Defendant stood.)

THE COURT: You may be seated.

(The Defendant was seated.)

Q. Phillip, since September the 8th, 1973, does he appear any different than he did when he pulled the trigger in your face?

A. He has lost some weight.

Q. Anything else?

A. His hair is different, and he has grown a little beard.

Q. What?

A. A bit of a beard.

Q. A beard?

A. Yes, sir.

Q. How is his hair different?

A. It's a bit longer.

MR. McDANIEL: No further questions.

CROSS-EXAMINATION

BY MR. GOODWILL:

Q. Phillip, wasn't it your father that first saw Mr. Turman?

A. Yes, sir.

Q. Did he go over?

A. No, sir, not at that time.

Q. Did he say anything to your mother?

A. Yes, sir.

Q. What did he say?

A. He went and told my mother he thought Mr. Turman had shot himself or something like that, that we should go over and help Mrs. Turman.

Q. And she, of course, did not.

A. No, sir, she had just got back from church and she wasn't dressed to go over. She was changing her clothes at the time.

Q. So it fell upon you?

A. Yes, sir.

Q. You say that you—I can't recall your answer on direct in—that you could not describe the gun?

A. I couldn't describe the color of it.

Q. Do you recall describing it to me in the past as being a snub-nosed?

A. I said it was a small, short.

Q. Do you recall using the term snub-nosed?

A. I don't recall it, no, sir.

Q. Okay. When you first saw Mrs. Turman and the assailant, what was the lighting conditions where they were?

A. They were standing right by a fluorescent light.

Q. Okay. And what was Mrs. Turman saying to you?

A. She was saying, "Phillip, go back."

Q. Did she say anything about get help?

A. Yes, sir.

Q. Did she continue to say this the entire time you were there and up until the time you ran?

A. I don't remember.

Q. How much time elapsed from the first time you saw the man that you have described as the Defendant, and the time you turned and started to run? Can you estimate?

A. Oh, I'd say about 20, 25 seconds, something like that.

Q. Do you remember which hand the gun was in?

A. It was in his right hand.

Q. You don't actually know who shot the third shot, do you?

A. No, sir, I didn't see that one.

Q. Do you remember describing the man that shot you to me as being a big man, you could tell he was a big man, heavysset?

A. Yes, sir.

Q. Do you recall telling me that he was on the tall side?

A. Yes, sir, I said a little toward tall.

Q. Do you recall telling me he was just a little shorter than you were?

A. Yes, sir, I said he was shorter than me.

Q. That wasn't my question.

MR. McDANIEL: What page are you on?

MR. GOODWILL: I'm not on any page.

MR. McDANIEL: All right, okay.

MR. GOODWILL: Now on Page 6, though.

MR. McDANIEL: Okay.

Q. How tall are you?

A. Six foot two.

Q. Page 8 of the deposition you recall that we took in the office?

A. (Nods head.)

Q. Do you remember me asking you the question: "How big was he in relation to you? Answer: I'd say he was a little bit shorter. I never really did, you know, stood up him, next to him; but looking at him, I would say he was a little shorter, but not much."

A. Yes, sir.

Q. Do you recall that?

A. Yes, sir.

Q. Is that still correct?

A. Yes, sir.

Q. Okay. During the time that you saw the man, you weren't keeping your eyes on him every minute, were you?

A. No, sir.

Q. You were worried about Mr. Turman?

A. Yes, sir.

Q. And that was your prime concern, wasn't it?

A. Yes, sir.

Q. Is that the reason you didn't get out of here, as Mrs. Turman was trying to tell you to do?

A. Yes, sir.

Q. Because of your concern for Mr. Turman?

A. Yes, sir.

MR. GOODWILL: Just one moment, Your Honor.

THE COURT: All right, sir.

Q. Did the man who shot you that day have a moustache?

A. I couldn't say for sure if he did. It was a very thin one.

Q. Were you close enough to him to be able to see whether or not he did?

A. Yes, sir.

Q. Whether or not he did or didn't?

A. Yes, sir.

Q. Do you remember telling me on that deposition that the man didn't have any hair on his face when you described him to the officers?

A. Yes, sir.

Q. Basically, the rest of the description is as you just told me a minute ago?

A. Yes, sir.

Q. Big man, tall man, just a little shorter than you are?

A. Yes, sir.

MR. GOODWILL: I have no further questions.

THE COURT: Redirect?

MR. McDANIEL: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. McDANIEL:

Q. Phillip, in response to Mr. Goodwill's question, you said you could not tell what color the gun was, is that correct?

A. Yes, sir.

Q. Can you estimate how far your face was from the end of the gun?

A. About two feet, two or three feet.

Q. All right. I believe that you said that you were squatting down over Mr. Turman at that time?

A. Yes, sir.

Q. Was Mr. Darden standing on the ground or was he standing inside the building?

A. He was inside the building in the doorway.

Q. In the doorway?

A. Yes, sir.

Q. Higher than you?

A. Yes, sir.

Q. You were looking up at him, is that correct?

A. Yes, sir.

Q. Did the gun in your face make him look any bigger at that time?

A. Yes, sir.

Q. You told Mr. Goodwill you did not know who fired the third shot that hit you in the side, is that correct?

A. Yes, sir.

Q. Did you see anyone else at that time in that vicinity with a gun in their hand besides Mr. Darden?

A. No, sir.

Q. Did Mrs. Turman have a gun in her hand?

A. No, sir.

Q. Did you see a gun in her hand?

A. No, sir.

Q. Phillip, after all of the cross-examination now, would you look again and tell this Jury whether you have any doubt whatsoever this is the man who pulled the trigger in your face.

MR. GOODWILL: I object, Your Honor. Repetitious. He's already made the identification.

MR. McDANIEL: I am sorry, Your Honor. It may have been weakened, I don't know, by cross-examination. If he did, I would like the witness—

THE COURT: Well, the purpose of redirect is to bring out new matters on rebuttal of anything on cross,

and not to rehash the same thing as before. I will sustain the objection.

MR. McDANIEL: All right.

MR. GOODWILL: I just have one question.

RE-CROSS-EXAMINATION

BY MR. GOODWILL:

Q. Phillip, do you remember telling me that when you looked down and you saw the gun, that your mind just went blank for a minute?

A. Yes, sir.

Q. Is that true?

A. Yes, sir, it did go blank for just a second.

MR. GOODWILL: That's all.

[VIII; 713-715]

[TRIAL COURT'S PREARGUMENT INSTRUCTIONS TO JURY]

PROCEEDINGS

January 19, 1974

THE COURT: Ladies and gentlemen, we have now reached that stage of the trial proceedings where you will hear the closing arguments or the summation of the attorneys. Each of the attorneys, I think, are going to speak to you today. First, let me tell you what their summations are not. They are not evidence, and you are not to consider them as evidence. Any statements of fact or statements of their recollections of what the evidence was is not binding upon you. You are the sole judges of the evidence, and your memory of what the witnesses said is what counts. I am sure that none of the attorneys would intentionally misquote any evidence or mislead you in any way. They are all respected attorneys back in Polk County; they are all personal friends, I think, of mine; and I know each of them well. And they would not misrepresent anything intentionally. Still, memories manage to differ. And your memory is what counts. Their statements of law are not binding upon you. You will take the law as I shall instruct you upon it at the conclusion of the arguments. On the other hand, they are permitted to argue the law to you. They are certainly permitted to argue the facts to you; so that they will both be involved. But they are not binding upon you.

Now, let me tell you what they are. They are a big help to you, or can be. These are men who are trained in the law or trained in trials, and their analysis of the testimony, their analysis of the issues, their comments upon the pertinence and the weight of the particular items of testimony can be extremely helpful to you in reaching your deliberations or any of your deliberations in reaching your verdict.

So, I urge you to pay very close attention to them. You will listen closely to all of the testimony, and I

appreciate it very much, and I would urge you to pay equally close attention to the summations by the attorneys.

Now, under our rules of procedure, if the Defendant puts on no testimony other than his own, then his attorneys are entitled to the closing argument. That was the case here. So the order in which they will speak this morning, Dennis, I guess you will open?

MR. MALONEY: Yes, sir.

THE COURT: For the Defendant, and then both Mr. McDaniel and Mr. White will speak, and then Mr. Goodwill will have the closing argument. All right, are you ready to proceed, now?

MR. MALONEY: We are ready.

MR. McDANIEL: The State is ready, Your Honor.

THE COURT: All right, you may proceed, then.

[VIII; 716-737]

[CLOSING ARGUMENT FOR PETITIONER: MR. MALONEY]

MR. MALONEY: I don't intend to take a lot of time, no more than half an hour. I thank you for the attention that you have given. It's been five days now, and I have never been in a trial that lasted five days, and I am sure none of you, most of you have never been on a Jury that lasted five days. It's the attention that you have given the State's case and the attention you have given Mr. Darden, I thank you for.

And again, I sympathize with you. For you see, whereas Goodwill and I and Mr. McDaniel and Mr. White have been wrestling with this thing for five days, actually more than that, months, five days here before you, we are done. The monkey is off our back. All of the evidence is in. We put in all that we are going to put in. The State put in all that they are going to put in. It's all over. It's all before you now, and quite frankly, we are asking you to play God. We are asking you today to determine whether a man is going to go home to his family or whether a man is going to die, it's just that simple. But it's not very simple, is it?

I intend to just briefly summarize the evidence that has been before you. I'm going to attempt to be as objective as possible. The first witness that you saw was Mrs. Turman, who was a pathetic figure; who worked and struggled all of her life to build what little she had, the little furniture store; and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before her eyes, by what would have to be a vicious animal.

And she came before you, and she told you about it, and it was very difficult for her to do so. And then in the end, Mr. McDaniel said was the person in the room, and she said yes, sir. Who did it, and she said he is here. That is what is called positive evidence, eyewitness identification. Very good evidence.

But I ask you to put yourselves in her position in that was she really in a condition to get a good look at him? You remember I asked you earlier, do you

really think that if you were to see a picture of me four months from now, you would be able to say, I remember that fellow. Perhaps you could. If I killed your wife or your husband, sexually assaulted and robbed you, could you? It would be more difficult if I did it in a dimly lit room, late in the evening. It would be more difficult still.

The police asked her, I think, at eight o'clock, the report came in. The police were right there on the scene at that little furniture store, hauled her husband off; he died some two hours later, And the police asked her who did it, what this man looked like. And I think her description was, I think we've heard it, it's in evidence: She said he was a heavyset man. He weighed 200 pounds or over. He was five foot six. Remember, that was at eight o'clock, two hours after this happened. That was her description of the man. Mr. Darden, would you stand up?

(The Defendant stood, and then was seated.)

MR. MALONEY: Five foot six and over 200 pounds? Four or five days later, she identified Mr. Darden as being the man that had done it. He had been arrested, put in jail. He was at a preliminary hearing. There were no other black men in the room. Just a question of a woman admittedly in shock being brought in for a ridiculous legal formality, with her sister to keep her from breaking down to get her there, bring her in, put her on the stand, and say, is this the man? Is she going to say no? I don't think she would. The only black man she knew and so from that preliminary hearing we get to this trial and on that identification, which I think could easily have been mistaken, because of the circumstances surrounding it. And go so far as to say, in my opinion, the identification was mistaken.

The next witness was Mrs. Hill. I forgot one thing about Mrs. Turman. She was able to say that she thought the crime occurred shortly after six, she didn't know exactly when, shortly after six. Then Mrs. Hill

came along and she heard the shots and she also said that it occurred shortly after six. So we have got the time down—not real well—we would like to get it down to 6:06 o'clock, but we can't. It was shortly after six. So she said she lived 500 yards up the road and that she heard the shots and came out and saw Phillip Arnold, the boy who got his mouth blown up, running up the road. She did not know Phillip very well, but she went out and tried to help him, get him over to the tree for the ambulance.

I think the importance of her testimony—I think the reason that Mr. McDaniel and Mr. White asked her to testify is that she was able to say that this was shortly after six, and two, "I looked down the road and there was" I believe she said a green, late model Chevrolet turning into Route 92, the road that is right in front of the furniture store.

And I think it was a black man in the car, I think that's what she said, a black man, or a white man very heavily tanned, from 500 yards, you know, it's neither here nor there. It's not really in question anyway, the man that shot Mr. Turman, shot Mr. Arnold, was black. It is entirely possible that the man driving the car was the man that did that.

The State's next witness was John Stone, and this was a very unusual witness, I would say, because he was almost our witness, a Defense witness. He said, "I was driving home from St. Petersburg, had the family down to the beach and it started raining and we started on home. I didn't have a watch, so I don't know for sure what time it was. But once again, I think it was shortly after six. I saw an accident; indeed, I was almost involved in an accident. The man almost hit my car, and he drove off the road and hit a telephone pole."

Mr. Stone got out of the car and went down in an attempt to render assistance. The man that he identified is the man that ran off the road and hit the telephone pole, is Willie Darden. We are not contesting that.

The State can come across with all sorts of things, but that's not important. We're telling you the man who ran off the road and had the accident was Willie Darden, and that was shortly after six. I think the interesting thing about Mr. Stone's testimony and the thing that differs from virtually all of the—well, not virtually all—both of the State's eyewitnesses, Mrs. Turman and Phillip Arnold. Mr. Stone said that the man he saw was about six feet tall, medium build, middle-aged, and had a moustache. Mrs. Turman said the man did not have a moustache. Phillip Arnold said the man was clean-shaven. The only man, the only man who saw Willie Darden on that day, said Willie Darden had a moustache.

The next witness is Mary Simmons, the girl who came along and saw the accident, saw this man standing around there, stopped and says, "Can I give you a ride to Plant City to get a wrecker?" Darden says, "Yes, please, I'd appreciate it." He gets in the car and drives to Plant City, attempts to get a wrecker in Plant City and can't get a wrecker. Says to the girl, "I'll pay you if you will drive me to Tampa," which she does. There is nothing particularly unusual about the man. The man did exactly what anyone of you would have done, I think, if you had had an accident, your car disabled, you would go for a wrecker, something to get it out of there. You can't lay on the side of the road. This is not a man fleeing from a murder and a robbery and a shooting of a little boy. This is a man driving to Tampa who has an accident, then does the logical thing, get a wrecker. There was a lot of talk, I guess, about his shirt, bloody shirt. Darden says his nose was bleeding. He had taken the shirt and wiped some blood on it. He hurt his stomach and he come out crouched. Mr. Stone said yes, when I saw the man, he was bent over like that. Darden said I hit my head and my chest on the steering wheel after hitting the telephone pole; pulled out his shirt, and there is nothing unusual, nothing incriminating about that. The State would have you believe it is. It is not. Bloody shirt, there's no mention of that. Where did the

blood come from? Darden says it came from me. The implication that it didn't come from Darden, that it came from someone else. There is an easy way to test that. You can run a blood grouping test to find out if the blood on the shirt belonged to the person who owned the shirt. Mr. Turman's blood type was not Mr. Darden's type.

MR. McDANIEL: Your Honor, he is not arguing, he's testifying.

THE COURT: Oh, I think it's within reason, and I'll overrule the objection. Go ahead.

MR. MALONEY: I am a little bit out of turn, you know. I think if I asked Dr. Mezger if you recall, what was Mr. Darden's blood type, I think I asked Dr. Mezger what was Mr. Turman's blood type, and I think Dr. Mezger said Mr. Turman's blood type was Type A and Mr. Darden's blood type was Type O. So, you can safely disregard any implications which might arise from a bloody shirt.

The next witness was Mr. Cunningham, an excellent witness, an excellent witness. He had been at it how many years? 15, 20 years with the FBI experts. He knew what he was talking about. Took a look at that gun and said that gun was a .38 regular; it was re-chambered to a .38 special; there are thousands of them in the United States, thousands. .38 used to be a standard police weapon. He said he took some bullets that he had fired from the gun when they sent it to him in Washington, D.C., under a microscopic examination, he said he checked the rifle characteristics, checked the lens and grooves and test fired the weapon and compared the slugs which he had test fired of that weapon to the slugs coming out of the head of Mr. Turman.

He said there is no way I can tell you where that slug came from, no way. It could come from any .38 special. It could no more come from this pistol than any other .38 special. Asked him was it possible to tell when was the last time that gun had been fired before he got it. He couldn't tell that either. That was his testimony and that would be expert from Washington, D.C. That was the man paid how many dollars to

get down here, ask his expert opinion, of whether the bullet that killed Mr. Turman came from that weapon, and he said, well, "I don't know. It could have come from any .38 special or .38 regular, any .38 Smith & Wesson."

I wonder how much credibilty, how much weight you can assign to that weapon.

Then came Mr. Brady. Mr. Brady, who has been with the Polk County Sheriff's Office for 17 years, has been in charge of the ID section of the Polk County Sheriff's Office for 16 years, in charge, the main man, said Mr. Brady, when you got on the scene, did you fingerprint anything? It seemed to me you would fingerprint everything and Mrs. Turman said the man had been in the store for 10 or 15 minutes looking at stoves, looking at beds, looking at \$600 worth of furniture, took that money out of my cash register. Was he careful about it? No, he wasn't careful.

Al Brady, the ace investigator, "Al, did you take any fingerprints?" "Yeah, we took fingerprints of the cash register." "And did you get anything?" "Well, why didn't you take any of the fingerprints of that sliding window that the killer had to close, or that sliding door, or the back door that was pulled down, or the doorknob." And you see a picture of that doorknob that he had to close with, taking fingerprints of that? "No, sure didn't. She didn't tell me to." Chief of detectives in Polk County, Florida. This widow, in shock, didn't tell him to and so he didn't do it. Wouldn't it be nice if he did? Wouldn't it be nice if he could give you a fingerprint? And took it from the back door, took this from the sliding front door, all of these fingerprints match Willie Darden, that would be nice. Fingerprint is very good identification, but he didn't do that. He fingerprinted the cash register, he didn't get any fingerprints. Wouldn't it be nice for me—I'd like lots of fingerprints. Wouldn't it be nice for Mr. Darden? But, you don't get the benefit of that because a widow in shock forgot to tell the chief of detectives, the identification of the Polk County Sheriff's Office, to dust for fingerprints. How about tire prints? The State is mak-

ing an awful lot of the accident down the road. If we could just get tire tracks, a picture—it was raining. A little photograph, a Brownie, an Instamatic, I don't care, a photograph of the tire tracks taken from out there on that muddy driveway or going down to that accident and look at the wheel, an expert can do that. Bang. They could say yeah, this car hit that telephone, was right there. It pulled into the front. It stopped. It was parked here. Don't know who was driving it, but that car was here. Did the chief of ID of Polk County, Florida, bother to do that? No, he didn't bother to do that at all. Apparently the widow didn't tell him to do it. I wish he had, I'll bet the State wishes he had, I bet you wish he had.

The Judge is going to tell you to consider the evidence or the lack of evidence. We have a lack of evidence, almost criminally negligent on the part of the Polk County Sheriff's Office in this case. You could go on and on about it. We all know there has been no expert testimony. You don't have to be an expert to shoot a gun. Isn't it true that you can tell from watching television that there is a way to tell a man fired a gun in the last few hours? Isn't there a ultraviolet test you stick your hand under and you can see the carbon. Isn't there a paraffin test? Did the Polk County Sheriff's Office give this man, who they arrested some four hours later, a paraffin test, an ultraviolet test? Did they bother? No. They didn't bother, they just didn't bother. I just don't know why they didn't bother, but they didn't bother to do it. The facilities are there. It takes five minutes to do it. It goes on. There's no evidence.

Darden asked for a lie detector test. Did he get his lie detector test? No. They didn't bother. Darden asked for a lineup. Does he get a lineup? Didn't bother. Polk County just decided we got our man, we caught him a couple of hours after the incident, and it was a marvelous bit of police investigation and they stopped right there. They just said, we got the man. Wouldn't it—if they did have the man, couldn't lock on this thing right here, and said, we've got the man. Look at that, he fired a gun within the last 48 hours. Nothing. Everybody picked him out in the lineup? Have photograph

of the tire tracks that match the car he crashed in there? Fingerprints found inside the store on the sliding door and the door handle? Didn't have it.

You people would just be putting in time and so would I. But I'm not putting in time. I haven't been putting in time for the last five years, because they don't have it. They didn't bother to do it. They took a coincidence and they magnified that into a capital case. And they are asking you to kill a man on coincidence.

MR. WHITE: Your Honor, the State is going to object to that last statement.

THE COURT: I think it's reasonable comment. The objection will be overruled. Go ahead, sir.

MR. MALONEY: Dr. Mezger then testified about that, Phillip Arnold testified to it. Phillip, poor guy, was in the wrong place at the wrong time. His father saw Mr. Turman get shot, told his wife to do it, and the wife told Phillip to do it; and I think if Phillip had a younger brother, he would have told the younger brother to have done it, until the end of the stick. And Phillip walked over there. And he looks down and see this man with blood pouring out of his head, and leans down to help him. Looks up briefly, sees a black man and Mrs. Turman.

Mrs. Turman screaming, "Go away, Phillip, get out of here." He said, I didn't pay a lot of attention to her, I was just concerned with the man. He was standing there looking at him, and he looks up and the man has got a gun and it goes bang, and hit him in the neck and the bullet is still there. And bang, and by this time he has caught on to what is going on, and he is up and running and he is hit. If he had been an older woman or a man, he would be dead. He wouldn't have got up. But he is a young, strong boy, taking two shots from point-blank range with a .38 caliber pistol and he still gets up and he starts running.

And this murderer ran after him, aimed again, and this poor kid with half his brains blown away. Fires away, again hits him in the back, and he keeps on running. Mrs. Hill said he ran 500 yards before he col-

lapsed in front of her house. It's the work of an animal, there's no doubt about it.

But what about Phillip's identification? Under those circumstances, do you think it is really gotten good identification? No, it was dark. The man—Phillip Arnold, 16 years old. Have you ever leaned over and saw a man with his face blown away and then looked up and had your own blown away and then you can identify the person? The boy is not lying. There wasn't a person that you saw take that stand to swear to God to tell the truth told you a lie today or in the last five days.

He wasn't lying. He is 16 years old, saw the papers, knew they had a suspect, he went along with the majority. He went along with what the police told him. The police could have arrested me, painted black chalk on my face, and Phillip would have said yes, because the Polk County Sheriff's Office had made their case.

Then came Dan Weatherford who discovered the pistol, some 39 feet from where the accident occurred, found—was it four—spent cartridges. I think it was four spent cartridges, one missing in the chamber, and one live round in there. So, they have got themselves just what they need. They are going to hang the man that crashed that car, because he happened to be black, middle-aged, and going in the wrong direction.

We said, Mr. Weatherford, you are a detective, you have been a detective for years and years. Can you tie that pistol to this man? Have you got any evidence that you can tie that pistol to Willie Darden? No, sir, I do not. Is there any evidence you can tie that pistol to the murder of that poor man Turman or the shooting of Phillip Arnold? Answer, no, sir, no evidence. That's the string that runs off of this case—no, no, sir, no evidence. The gun is found 40 feet from the wreck, 39. Mr. Weatherford also indicated it was found exactly 39 feet from the road, heavily traveled road, a few hundred feet or a hundred feet from a railroad. How many feet from the parking lot of a well-used bar? Said at the accident scene there was just lots of people, lots of people standing around, tromping around the old accident scene, lots of

people there. Lots of people looking for guns. He didn't find any until 18 hours later. And how many other people had driven by? And you have even from a train or a car and there is a number of ways that you can get a pistol out there.

But can you get the pistol back to Mr. Turman? Can you get the pistol back to Mr. Darden? No, we can't do that, but we got the pistol, and it's good enough for us. It's not good enough for me. I wouldn't do what you're being asked to do on that, really, I wouldn't. You are going to get an instruction from the Judge on circumstantial evidence, which is what the State would have you believe that an accident is circumstantial evidence.

I would suggest to you that that is not circumstantial evidence. It really isn't. Because, they are asking you to draw some inferences. The first inference they are asking you to draw from from that pistol is one, that pistol belongs to Willie Jasper Darden. There has been no evidence on that. Two, that pistol that, by inference, belongs to Willie Jasper Darden, that pistol killed Mr. Turman, shot him between the eyes and blew his brains out. That pistol shot Phillip Arnold three times.

Two inferences, both of which are totally unsupported by one shred of empirical, hard-core, factual evidence—fingerprints, ballistic reports, no paraffin test on the hands of Darden, no nothing. Inference on inference. It is no longer circumstantial evidence when it is inference on inference because at that point, it is speculation, pure speculation. It's guesswork. Go in there and guess and come back with the verdict. And you know what the verdict is that the State wants. You know what the State would like for you to do. That's the State's case. I am not going to talk about our case. Our case is Mr. Darden, and Mr. Goodwill will talk about Mr. Darden. Just the State's case is all that I wish to talk about.

I honestly think that if we had done nothing, nothing at all, no evidence; if Mr. Darden hadn't been asked to take the stand, submitting himself to rigorous cross-examination; if we had done nothing; if, when Mr. McDaniel said the State rests, Mr. Goodwill stood up and said the Defense rests, then you could not return a ver-

dict of guilty of murder in the first degree. You could not return a verdict of robbery. You could not return a verdict of assault with intent to commit murder.

Because, there is so much doubt here, so much unanswered with no attempt to get the answers, that you people have got to walk back in that room and ask yourselves why, why not, why didn't they give us something to work with here instead of coincidence and two people in shock. But they didn't bother to. They didn't bother, the Polk County Sheriff's Office didn't find it necessary.

So they come on up here and ask Citrus County people to kill the man. You will be instructed on lesser included offenses. I think that you will find it rather boring. The question is, do they have enough evidence to kill that man, enough evidence? And I honestly do not think they do. Thank you for your time.

. . . .

[VIII; 738-748]

[CLOSING ARGUMENT FOR THE STATE: MR. WHITE]

* * *

MR. WHITE: May it please the Court, Your Honor.

THE COURT: Yes, sir.

MR. WHITE: Ladies and gentlemen, on behalf of Mr. McDaniel and myself, I want to thank you for your attention in this case. As Mr. Maloney stated, our job is about over. The evidence indicates one thing especially. That man sitting right over there is a murderer and I don't care what the Sheriff's Department didn't do, Mrs. Turman was on the stand and Mrs. Turman pointed to him and said, "That man murdered my husband."

Phillip Arnold was on that stand. Phillip Arnold points to him, "That's the man that shot me in the face." You don't need fingerprints for them to say them. You don't need tire tracks for them to say that.

Ladies and gentlemen, the Sheriff's Department of Polk County is not on trial today. Willie Jasper Darden is. Let's go through the evidence.

Mrs. Turman, Mrs. Helen Turman. Her husband, Mr. Turman, they run Carl's Furniture Store at 3730 New Tampa Highway. They don't any more. Mr. Turman is in the cemetery somewhere with a hole in his head, and Mrs. Turman shut the door, getting ready to close the store. Her husband was out with the dogs. Willie Jasper Darden walked in. She's with him 10 to 15 minutes.

The first part, she is treating him as any customer. The second part, she's scared to death of him. Ladies and gentlemen, somebody shot and killed your spouse in your presence, would you forget that person's face? Or would that face go with you to your grave?

I'm not talking about fingerprints, I'm not talking about tire tracks, I am talking about Mrs. Turman sitting on the stand and Mr. Goodwill cross-examining her for a half hour and not once did she waver and not once did she say maybe that's not the man, not once did she say maybe I am wrong. Every time, I am positive that's the man, no doubt.

Mr. Maloney forget to mention that to you. He forgot to tell you that Mrs. Turman has no doubt. He forgot to tell you that Phillip Arnold has no doubt.

Ladies and gentlemen, if those two don't have any doubt, why should you? Mrs. Turman saw her husband shot. A charge of murder, the first element. The State has to prove to you is that a man is dead. The doctor told you that he was dead. The doctor took the bullet out of his brain, and you passed that bullet among yourselves, and said that bullet was the cause of death, no doubt a man is dead. There is no doubt that man is Mrs. Turman's husband.

And the next element that killing, that murder has to be unlawful. It has to be from a premeditated design. Listen carefully. When the Court instructs you on the law of what premeditation is, there is no time minimum on it. You don't have to think about killing somebody for three minutes before you have the premeditated design. What it means is that you have the fixed, formed intent in your mind to kill somebody.

Mrs. Turman testified Willie Darden had her by the shoulder, had a gun in her back. Her husband came in the door and she said, "No, Jim, no"; that gun came from her back, went over her shoulder, and the bullet was discharged between his eyes.

Ladies and gentlemen, when Willie Darden took that gun from her back and lifted it and pointed it and fired it, what did he intend to do? What did he intend to do—he intended to kill whoever came in that door. He didn't know who Jim was. It could have been you, it could have been anybody. Whoever walked in that door at that time was a dead man as far as that man sitting over there is concerned.

You cannot deny Mr. Turman's testimony. After Mrs. Turman was Mrs. Hill. Mrs. Hill heard four shots. Mrs. Hill saw the greenish colored car go away with a black male in it.

Al Brady, who was at the scene of the accident said it was a greenish-gold car. Both of them said late model Chevrolet. The accident was a little more than three

miles down the road, just a few minutes later. It was the same car. Mr. Stone testified that he saw this man sitting before you today pulling up his zipper, buckling his pants. Mrs. Turman told you that that same man unbuckled his pants and pulled down his zipper a few minutes before. She didn't see him pull it back up. Is that a coincidence, that both could identify the same man? That one could see him pulling down his zipper and a few minutes later, one could see him pulling it back up? It's not coincidence. It's the same man both times.

Mr. Maloney admitted to you Mr. Darden was in the accident. Mr. Maloney admitted to you that this was a heinous crime. Mr. Maloney admitted to you that Mrs. Turman was robbed, that Mr. Turman was murdered, Phillip Arnold was assaulted by somebody with intent to murder him.

Let's to to that third count in your indictment, assault with intent to murder. That means when somebody assaults you and in their mind they mean to kill you. Somebody puts a gun in your face and fires it, what do they mean to do? Joke around with you? Miss? They mean to kill you.

While we're on that, what can they tell you that would wipe away Phillip Arnold pointing to the man with no doubt in his mind? Now, they're going to tell you he was mistaken, he was under pressure.

Ladies and gentlemen, if somebody put a gun in my face and fired, he wouldn't have to shoot again. I would be dead then of a heart attack, especially when I wasn't expecting it. What did that 16-year-old boy do? He tried to get up. He was shot in the mouth. He was shot in the throat, he was shot in the side, in his back. And he kept running. That was acting under pressure. That was cool under pressure.

Now, are they going to tell you that somebody that keeps his head under such extreme circumstances was in that state of mind that he could not identify the man? He could, and he did, more than once, in this courtroom before you today.

Rather than talking about what the State doesn't have, you ought to look at what the State has. Look at the

testimony. Dr. Mezger, the man is dead; this bullet killed him. Mr. Cunningham, I examined the rifling, the right twist, this bullet could have come from this gun.

Mr. Maloney told you there were thousands of those guns. Mr. Cunningham told you it was a collector's item.

Then we get to the last State witness, Dan Weatherford. Mr. Weatherford found that gun 39 feet from the accident the next day. This is how he found it. This is the fired pin, looking at it right now. You are at the actual handle of the gun, I am the barrel right here. This is what you're looking at. This is how he found it.

Let's see how we can make it be that way. If this is the one, if this is the shot right here that was under the hammer when this whole episode started; fired, Mr. Turman's brain, empty chamber; a click, and Phillip Arnold's face, fired, right into Phillip Arnold's mouth; fired, right into Phillip Arnold's throat; fired, right into Phillip Arnold's back. When that would happen, it would look just like that.

You remember Mr. McDaniel had Dan Weatherford set that gun with the live remaining shell under the hammer and remember, he had him fire five times. Remember, Mr. Weatherford opened up that gun and it looks just how he found it, one shot into Mr. Turman, one click, three shots into Phillip Arnold.

Ladies and gentlemen, the State proved to you that that gun was found 39 feet from that accident. The State would not put a witness on that saw Willie Darden throw that gun there. That's because only one man can testify to that, Willie Darden. He didn't. Nobody ever thought for a second he would.

You have got murder, you have got premeditated intent, you have got a dead body that you have to account for. You have got two people who pointed to him, no doubt whatsoever, and said that man right over there sitting beside Mr. Maloney is a murderer. And it's not hard to believe, because when something serious, when something tragic happens to you, you remember it, it goes with you to your grave.

You have got robbery, you have got money in a cash register that belongs to that store, that was in the cus-

tody of Mrs. Turman that this man over here yanked out after he had a gun; necessary element of robbery is when you take something. It is robbery if you take it with force or threat of force.

Would each of you, if you had money in your custody and the man comes up to you with the gun and says if you cooperate, you won't get in trouble, or something to that effect. Would you give him the money? You're durn right you would, because he threatened you, to use force. He had the gun in his hand plain and visible.

You have assault with intent to commit murder. Had that Arnold boy died, that would be murder. Of everybody you have seen today and seen throughout this trial, I would wager anybody who has been in this room this whole day, the luckiest person is Phillip Arnold. Willie Jasper Darden probably wishes he were dead, that would be one less eyewitness. That's why Phillip Arnold was shot at anyway. Phillip Arnold fooled Darden, he lived. He walked into Court and he pointed at him.

Ladies and gentlemen, that's eyewitness. You have heard Mr. Maloney stand before you and tell you how good fingerprint testimony is, how good tire tracks are. Ladies and gentlemen, the best kind of evidence in the world is a man that saw it happen, an eyewitness.

Mrs. Turman had nothing to gain by pointing to Willie Darden. She had already lost everything she had in the world, her husband. She doesn't have another one to lose, no need to point at a man that didn't do it.

Phillip Arnold has nothing to gain by pointing to a man that didn't do it. He is already carrying a bullet inside him today. If he points to the wrong man, that bullet won't leave him, it will stay there. In fact, there is only one man, only one witness that testified before you today that has anything to gain or lose by what he says, is Willie Darden. Everybody else had no reason to lie.

I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life.

[VIII; 749-781]

[CLOSING ARGUMENT FOR THE STATE: MR. MCDANIEL]

MR. McDANIEL: Ladies and gentlemen, I want to thank you for a week, I want to thank you for your time. I assure you that it was necessary under the circumstances, to use your time opposed to a week of our time. I want to assure you of something else. I'm not emotionally involved with Mr. Darden, Mrs. Turman, and Mr. Arnold. I have no amimosities for Mr. Darden except that he committed this crime or these crimes.

Now Mr. Maloney and I am positive, and I assure you and I guarantee you that Mr. Goodwill will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try Mr. White. I guarantee that, because he has notes I gave him many years ago.

But let me tell you something. As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons. As far as I am concerned, and as Mr. Maloney said as he identified this man, this person as an animal, this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?

Mr. Darden said, oh, I don't know, no, I can't know, it's all right to drink, it's all right to drink alcoholic beverages, except the last. Remember one comment he made? Unless, well, as long as they don't find out. Find out? He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.

This man admitted that he is a prisoner, that he had a gun in his possession. He doesn't work, he is in the pool halls, he is in the bars, he is in the lounges. He is a prisoner, supposed to have been. He is not a prisoner. No, I wish that person or persons responsible

for him being on the public was in the doorway instead of Mr. Turman. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of the boy.

Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them. Turn them loose to visit his family, to visit his family, that turns out his family is a girl friend in Tampa, his family is in, I think he called her his sponsor, his sponsor.

This sponsor, otherwise his girl friend, knew that he was a criminal—prisoner, I'm sorry, prisoner; knew, let him bring the gun into her house while he was on weekend furloughs.

MR. GOODWILL: Now, I object. There's been no testimony of this.

MR. McDANIEL: I'm sorry, I believe Mr. Darden testified to it.

MR. GOODWILL: I don't believe so.

THE COURT: The Jury are the judges of the evidence. As I told you before, ladies and gentlemen, you are the sole judges. Your memory of the evidence is what counts. Proceed, sir.

MR. McDANIEL: I believe Dr. Darden testified at first it was his house. He went by to see his property. His property? He is a prisoner. He is supposed to be. Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it.

Some of the remarks I heard in the opening argument by Mr. Maloney that I want to remember I disagree with, with his interpretation of the law. You take the law from the Judge. He said that we are asking you to kill this man on this evidence.

Well, he is wrong, of course. I think he knows he is wrong. The Court will tell you at the end of the argument in the Jury instructions at this point, you are merely to determine his innocence or guilt, nothing else, whether he is guilty or innocent. And after you return

that verdict of guilty of first degree murder, robbery, and assault with intent to commit murder, the Court will impose a sentence on Count No. 2 and 3, which is robbery and assault with intent to murder, and then you will be asked at that time to go back and retire and advise the Court whether or not he gets the death sentence or whether he should get life.

That is an advisory opinion on your part, and it has nothing to do with this trial, and Mr. Maloney knows that. But I am sure that I want you to remember Mr. Maloney's opening statement, opening argument when he called this person an animal. Remember that, because I will guarantee you I will ask for the death. There is no question about it.

The second part of the trial I will request that you impose the death penalty. I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose—this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes—not home, strike that, excuse me—go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend.

On voir dire, some people call it voir dire, I could care less, it's selecting the members of the Jury, Mr. Maloney said, and I wrote it down verbatim, the State's case is based entirely—he used the word entirely—upon two eyewitnesses.

But now, all of a sudden, when the gun comes in, I didn't hear the word entirely from Mr. Maloney. Well, I'm going to talk about the gun in a few minutes. The Court told you originally this morning the Defense attorneys would have an opportunity to make opening argument and Mr. White and myself would split our argument, which we're doing now. Mr. Goodwill will then

come back and rebut everything I say. I cannot come back and say anything against what he says. I cannot rebut. I cannot rebut his argument. I cannot anticipate, but he will say everything possible.

I depend on each of you to do for me what I can't do. Mr. Maloney said, well, sure he had the accident, because they have all kinds of—the State has all kinds—I hate to use the word fancy fingerprints to prove it, but do you think he would admit that accident if he wouldn't have had that fancy fingerprint to prove it? No, he wouldn't have admitted nothing.

I don't know, he said on final argument I wouldn't lie, as God is my witness, as God is my witness, I wouldn't lie. Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out.

What does he have to lose to lie? Nothing. Nothing. The only person who took that stand, Mr. Maloney said no one took that stand and lied under oath. He was wrong. One did. Sitting over there with a yellow shirt on with the stripe down the front at this time.

Mrs. Turman was on that stand the entire morning. A good part of it was cross-examination. The Defense attorneys, which I am proud to say that I was about seven years, attempted to break, get her to say well, maybe. No, well, yes, that's him, but. He kept after her for an hour and a half at my recollection, or an hour and 45 minutes to waver. Not once, not one time did that woman waver. Not one moment did she ever imply that she wasn't absolutely, totally, and completely positive. That is the man that murdered the husband, and as Mr. Maloney said, shot the boy in the face twice, in the back—excuse me, the back side, the back, once.

And I will say at this point, maybe out of line, out of order, but neither did the Arnold boy. Neither did the Arnold boy, testify absolutely, positive, direct, didn't waver for one moment under any questioning at any time and as Mr. White said, he was under pressure. Oh, my goodness, how can you remember these things? He was under pressure. He remembers the gun in his

face. Mrs. Turman—I don't know how they're going to get around this. I'm sure they will bring up something. Mrs. Turman was under pressure at one point, a great deal of pressure at one point.

But the first time that Darden was in there, she wasn't under that pressure. He went in the store, all the way to the back door with Mrs. Turman, and her husband was outside. And when Mrs. Turman—he circled the entire store for the sole purpose of making sure no one else was in the building and had Mr. Turman not come through that back door, Mrs. Turman would not have been on the stand yesterday.

Do you have any doubts about that? Did he buy anything? No. Did he circle the entire store to make sure no one else was there? She wasn't under pressure then. She was under pressure a few minutes later. When he said he would be back or his wife would be back, and she turned back to her desk, walked back to her desk and then somebody closed the west door of the building that she couldn't see from her seat at her desk. And then Darden comes back. With this—this lady, robbed her. Well, robbery is a horrible offense, but if he had just taken the money and got out, fine. But he didn't do that.

So, he is not only a robber, in his lust and in his greed, not just robbery for profit. If he had just robbed that poor lady and walked out, gotten in his car and went back to his girl friend's house and then went home Monday to the prison, that's one thing.

But then, in his greed and in his lust, gets to him. He takes the woman to the back where he had already been and as she said to the room by the back door—started back there, I'm sorry, where some mattresses were. We found out later why.

Mr. Turman, not knowing anything happened, not knowing what was going on. I wish he had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting here with no face, blown away by a shotgun, but he didn't. He had no gun. He had no chance. He didn't give it to him. With a gun in the woman's back about

to attempt his lust, his greed, the poor man opened the door and he shoots him between the eyes. Between the eyes, isn't that enough? Not for Darden it's not enough. There's more.

Now the robbery is over and now the murder is over, still not enough. All right, Mrs. Turman—Mr. Turman lying half in the building, I am sorry, mostly on the ground with one foot, I believe was in the building, and he slammed the door on the foot in the door and even at that point, four or five feet away, remember her testimony that he unzipped his pants, takes it out and tells the poor woman sitting on the floor to take her teeth out. I wish someone had walked in the back door and blown his head off at that point.

But he is lucky, the public unlucky, people are unlucky, it didn't happen. Mrs. Turman saved herself by praying of a crime by refusing because her husband was already lying with the bullet in his forehead between his eyes. She knew, or should have known it was murder on the spot. She refused, none of these facts are denied, she refused. She begged and she pleaded, sitting on the floor, looking up at that, that in his hand. Then Darden said something, got back to the cash register, with Mrs. Turman's testimony, was a few feet back in the hallway directly in line with the back door. These photographs you will have to take back in the Jury room with you, if you like, and again the gun.

Mud on the ground, outside the back door. The cash register, got back I believe in this area and the boy came in. I got the impression from Mr. Maloney that we ought to try Mr. Arnold. Why did you sent that 16-year-old boy over there? Well, I'm not going to try Mr. Arnold for sending Mr. Arnold, the senior Mr. Arnold. We are not trying that. The boy in an act of mercy, attempting to assist the man, and Darden—the boy asked for some help to get the man's head and body in out of the rain.

He asked for some help, and Darden said, "Sure, man, I will help you, sure I'll help you." The boy looks back up. He reaches down to, I think he used the words

squatted back down to Mr. Turman, and he looks back up and he has a gun in his hand, in his face, in his face. I believe the boy said two feet away.

And click, the trigger. Remember the click. I will explain it later. Right in his face, cold-blooded, calculating murder. I can't use any worse words than murder. I can think of some, but I can't use them.

Then he pulls the trigger and shoots a 16-year-old boy in the mouth from two feet away. What saved the boy? The only thing I know is, into the mouth, the boy is kneeling down and didn't have a direct angle to the brain or the back of the spine, but the boy is still moving, and Darden doesn't like people who move after he shoots them in the mouth.

So he shoots him in the neck. But, my gosh, the boy is still moving. Again the angle of the bullet, because he is standing up looking down at the boy. In the neck, Darden got unlucky for a change. Finally, Darden is losing his luck. The bullet didn't go in the spine. It lodges in the neck. The boy is still moving, and the boy runs and Darden takes aim and fires again into the side or back, whatever you want to call it. But Darden's luck again, he loses again and hits the ribs and comes back out the shoulder.

Up to this point, the boy had run down the road, but with it in the mouth, the side, the neck, with blood. Darden can't go back after Mrs. Turman this time because the boy then has gone out. He has lost the body this time, he is on the run. He can get help. He may not be able to talk with his two .38's in the mouth and what Darden thought was one in his back, but Darden then went to his car and left.

Mr. Goodwill said, in one of his examinations. I believe of Mrs. Hill—

(Discussion off the record.)

MR. McDANIEL: Mr. Goodwill said Mrs. Hill, isn't it possible—I believe this was Mr. Maloney—you remember, not me. Isn't it possible that this car that you saw coming in the driveway was merely turning around, had been coming from Tampa and was turning around

and going back? Did you see anyone get in that car? No, sir, it was moving when I saw it. The colored male or a dark-skinned white man, that's exactly what she said.

But Mr. Maloney, isn't it possible, isn't it possible that he was merely turning around? What difference does it make if he claims he didn't do it? That was one of the few times that Mr. Darden didn't break down on his trip from Tampa. That's one of the few times he didn't have car trouble, was in front of the Turman's residence. What difference does it make whether the car was turning around, turning upside down or what, if he wasn't doing it.

In fact, let's not forget one thing. Mr. Maloney says there is no question, Mr. Darden had that accident? Mr. Darden, was just returning from taking a friend home, going back to his home—that was home from prison, he was going back home to his girl friend. Let's not forget only one person in this courtroom these past, only one witness this past five days has been able to hear every word spoken from that stand before he took the stand, which is a right the other witnesses did not have.

Mrs. Turman and Mr. Arnold took the stand without being able to hear each other's testimony and they both testified under oath they had not talked about the crime since it happened. Are they liars? But he heard every word everybody said, and I assure you, if we hadn't been able to prove the accident, they would never have admitted it.

But the fingerprints, they have always got the answer. We had the eyewitness. Oh, the eyewitness was no good. You have got to have that fingerprint. If you have fingerprints, oh, no, you've got to have—that's just circumstantial, you have got to have that eyewitness.

No matter what you have got, you have got to have something else. What you have is no good, and that's what he's going to tell you.

There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's Office, but he and his keepers, the Division of Corrections.

Ladies and gentlemen, last Tuesday morning, I made an opening statement to you. I have no contact with this crime except from the prosecution. But sometimes, it emotionally gets to me. For four days I have saw that man sitting there—calm, cool, calculating, collected, with his arms closed, smiling at the right time, until it came up time for his parole was in question, and then he goes to the stand with his handkerchief in his hand, ready to use it when Mr. Goodwill pops the right question about the parole. And then we cry.

I don't cry for him, I cry for the one who is dead. I cry for what happened on September the 8th, not for him. I ask him, did you cry when Mrs. Turman was testifying about the brains running out of her husband's head? No, sir. Did you cry when the boy testified about the bullet in his mouth, did you cry when you talked about your running and chasing and shooting him in the back? No, sir. He cried only when it served his purpose, when he is hurt. It may not have been only his parole. I wonder, I just wonder if he hadn't been caught in this particular crime, if he hadn't had that accident 3.4 miles away from this murder, he would still be in the public on his furloughs, visiting his family, shooting his pool, selling his gun, drinking his whiskey.

He's even got a driver's license. Why in the world does—what in the world is a State prisoner doing with a driver's license? I wonder if the public is paying for it.

Remember the Jury instructions, listen to them very carefully, please. Listen to what the Court tells you about the credibility of a witness, what you can use, what guidelines you use to test the credibility of a witness. And I'm not going to read them all to you, I'm just going to read a couple little things about the credibility of a witness.

I want you to apply it to every State witness. Impeachment, the second page after credibility of the witness, as you will hear the Court say: A witness may be discredited, the weight of his testimony may be weakened or destroyed by proof of (1) that the witness may at another time made a statement which was incon-

sistent with his present testimony. All these other witnesses made statements in the past. Mr. Goodwill sat there very faithfully going through it. You couldn't hear Mr. Darden until yesterday, after he heard all of the other witnesses.

(2) that the witness has been convicted of a crime. He admits that, doesn't know how many times. He is on furlough and don't know how many times he's been convicted of a crime. He tells Mr. Goodwill three or four and he tells me four or five. He doesn't even know. What is it?

There are a couple of other things the statement of a witness is inconsistent with the testimony of other witnesses or established facts. Apply that to Darden. They always use the argument of circumstantial evidence. That's no good. Mr. Maloney said we only had eye-witnesses. Let's wait until we get to the gun in a minute. Circumstantial evidence. If you have a 10-year-old boy and he is locked in a room at your home, and no windows and no doors, and he is in there alone, locked from the outside, and you go in the room and he is sitting on the side of the bed, the only person in the room, and there's a cigarette burning in the ash-tray, smoke pouring from it, down halfway, and you say "Have you been smoking?" And he says, "Oh, no," what do you do? You believe him?

What Mr. Maloney and that says, Mr. Darden, I am going to ask you the same thing. Don't compromise your verdict, please. Do no compromise your verdict. It must be unanimous. Twelve of you must agree. The man is either guilty or not guilty. I'm asking the same thing the Defense has—don't compromise. You will get an instruction on alibi. Listen to it very carefully and remember Mr. Darden's testimony. He had been to Lakeland, didn't know where Auburndale was, but Dakota Avenue, Lakeland Hills Boulevard, left someplace at five minutes to one, got home at 17 minutes to seven. I couldn't even tell you right now what day I put a witness on the stand this week. If I thought about it, maybe I could remember, basically, Mrs. Turman, Phillip Arnold, Mr. Weatherford, 17 minutes to seven, five minutes to one. Are you going to

drive in five minutes from the north part of Tampa to the south part of Tampa? Why even make the trip?

All of that time he had to be back in Tampa at six o'clock for the little wedding. He didn't even bother calling anybody and telling them he wasn't going to be there. He had to be there, he had to be there, but he didn't even bother calling anybody telling them he wouldn't be there. So I assume they didn't get married or the poor guy she married didn't have a best man. He never called. He never called, remember? I asked him. He never called from Lakeland, Polk County, Hillsborough County, Tampa. When he came home he didn't call, nobody called.

He said no one called on his behalf. Lie detector test. That's the red herring they would like to throw in. I don't believe anything he says, but he said that he asked Officer Neil in Tampa, Hillsborough County Sheriff's Office to give him a lie detector test. No, I am sorry, strike that. He said Mr. Neil asked him if he would take one. He said, sure, with my counsel.

Well, only an incompetent lawyer would allow Darden to take a lie detector test. And that prisoner, with those convictions on his record, knows that.

Then he asked some jailer, he couldn't remember his name, but he could remember the name of that poor radio operator he asked to call about the wrecker. I don't know whether he asked his own attorney or not. I could care less. The Court is going to tell you later that if you have any questions about anybody's testimony, you can ask the Court to read back a portion or whatever portion of that testimony you would like to hear.

If Mr. Goodwill's memory is different from mine, ask the Court to have that testimony read back to you and the Court, I hope, will. If I am misquoting anything, and Mr. Goodwill says no, that's not right, and it's important to you, ask the Court to please have it read.

Poor Mr. Darden was so unlucky, when he gets out of prison on a weekend, he just happened to be riding by in the right time, the Turman's store, he just happened to be riding by at the right moment in the Tur-

man's store. He just happened to be riding in the same color car, although he says it is an antique gold. The rest of the witnesses are liars. He just happened to be identified by those two witnesses, independently and separately and unequivocally. He just happened to be riding on 92 instead of I-4. He just happened to be on a two-lane road. He just happened to be riding by at this point.

He just happened to have an accident two-tenths of a mile from the county line. Now, I don't think that the defense attorney seriously are going to question—I may be wrong—but I don't think they're seriously going to question that this bullet came from this gun. Remember the circumstantial evidence. What difference does it make if that's not Darden's gun? Why the hullabaloo about it? What difference does it make where the bullet comes from if this is not Darden's gun? What difference does it make what kind of gun it is if it is not his? It's his, it was his. It now belongs to the State.

All right, this is the gun. Mr. Darden's luck now goes—gets worse and worse and worse and worse. And now it just so happens he is so unlucky that he has an accident at this pole, and is just so unlucky that he has a gun found 39 feet from the post and the car is this way, 39 feet from that post and 39 feet from the edge of the pavement in a ditch. Isn't he unlucky?

All right, Mr. Weatherford testified that looking at the face of the cylinder—first, he testified that it was not buried in the mud and—take the gun back there and look at it, because does that look like a gun that was buried in the mud or buried in the water? No, it's only been in the water for that short period of time, 16 or 17 hours, long enough for the fingerprints to be gone. But he happened to find this gun right there, 39 feet from his car or his girl friend's car he smashed in the post. And let's see what the chambers look like. Mr. Weatherford says he picked the gun up. He picked the gun and turned it over, checked the barrel. So any—to see if there were any live rounds

in it, and then turned it back, looking from the hammer, very carefully pulled the chambers, opens it up, checks the plate.

Mr. Maloney couldn't remember how many shells are in it. Well, there were four spent shells and one live shell. This is the one we were using yesterday. Mr. Goodwill, you did not give any shells back yesterday. Do you have them?

MR. GOODWILL: I believe I did, sir. To answer your second question, no, I don't.

MR. McDANIEL: Okay. He's testified, Mr. Cunningham also testified that that cylinder turns to the left. As you fire the gun, pull the trigger, it turns to the left. I asked him to put the one marked in red—couldn't use a live one—under the hammer and pull the trigger. He did. When he was through pulling it five times, five times, because Darden shot Turman between the eyes; he clicked in the boy's face, that's number two; he fired in the boy's face, is number three; he fired in the boy's neck, is number four; and he fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself.

Check the gun when you go back, please. See that it turns to the left. This is in evidence. This is the next shot coming out. The gun, Mr. Weatherford found it, the hammer was on this chamber. That's the bullet that went in the boy's back. Darden had pulled the trigger one more time, this one would have come up. This would have been next.

So, in reverse order, as you notice when the gun is on the live shell, kick this on up as it was when Darden started his shooting spree, shift this on up. When Darden fires this live shell, it moves out of the way, and the next one—this one was live. That is in Turman's head. That's the bullet that went in his brain. That's the one that killed Turman, right there. That's the one that clicked in the boy's face. That's the one that shot him in the mouth. That's the one that shot him in the neck. That's the one that shot him in the back. And Mr. Darden saved one. Again, I wish he had used it on himself.

Oh, the poor guy, Mr. Darden was so unlucky at so many—he happened to be the one that was unbuckling his pants. He was buckling his pants because of Mrs. Turman. He didn't unbuckle his pants. He testified that he took his—he hurt his chest in the accident. My God, do you unbuckle your belt to look at your chest? If you've been in an accident, do you undo them, drop your pants? All you would do is pull your belt down, pull your shirt up. He didn't go to the doctor. He didn't go to the hospital, went on to his girl friend's. He testified all this blood dripping down. I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time. Not in the accident, but on the pole. But then he testified about the blood dripping. What did Stone testify to? Again, the Defense says oh, Stone must have been mistaken or is lying. Mr. Darden wouldn't lie, he wouldn't lie to save his own life.

I asked you on voir dire, would you not assume or guess about evidence, the admissibility of evidence, as decided by our Courts; when we can get evidence in, it's decided by the Court; whether Defense gets evidence in, it is decided by the Court, and not you.

I asked you this week, and you said you would abide by that. But unfortunately, there will be some red herrings out. But, please, when you hear Mr. Goodwill testify—I am sorry, arguing—please remember that I don't have a chance to rebut him, anything that he says. I have to ask you to do it for me.

Mr. Darden, his convictions, left the scene of the accident. Why? He came back. He came back after he went home and washed up. Why did he take the shirt off? Why did he have the shirt in his hand? I'll tell you why. If you, on these steps down here, what is the first thing that you notice about a person? What is the first thing you see? If he has a coat on, you notice the coat. The second thing, if he doesn't have a coat on, you notice his shirt, what kind of shirt he has on. What did it look like?

But he put the shirt back on when he got back in the car with Mrs. Simmons. He got the shirt back on. But he went home—I am sorry, went to his girl friend's

house. Then comes back, because he knows the car can be traced to him. There's a bar across the street that he had no objection of walking in the bar at 8:30 or nine o'clock to make a phone call. But he didn't do that at six o'clock or 6:05 or 6:10. He has got to go home to his girl friend's.

You can make your own assumption of why. No phone calls, no wreckers. He stopped at one service station, he says, to get a wrecker in Plant City. That's what he says. I don't know that he stopped at any. What was he going to do with the wrecker when he got it? I guarantee you he was not going back to the scene of the accident until he had gotten home.

The bullet in the boy's mouth is a statement by Mr. Goodwill, I assume, why didn't it match that, that the boy had taken out the teeth and the bone and everything else, out of his mouth.

Mr. Cunningham says he is the expert. He told you that he couldn't even match four bullets that he fired from the gun himself with each other, because of the condition of the gun. Not because of any mud, but because it had been sent to England and rebored or something.

What difference does all of that junk mean? What has that go to do with a case if he didn't fire it? If it is not his gun, what difference does it make? If there's any question that this bullet from Mr. Turman's brain came from this gun, any question about Mr. Turman being dead, with a bullet in his brain; remember, Mr. Cunningham testified—remember Mr. Cunningham's testimony of your own, please don't remember Mr. Goodwill's testimony about Mr. Cunningham. He said this gun, although at one time was sold to the public, that it now is becoming a collector's item, a collector's item. What difference does that make if Darden didn't do it, if it's not Darden's gun? It's his gun, and don't forget it, please.

Don't forget, please, about when Mr. Goodwill gets into five foot six and five foot eight, 185 pounds, 200 pounds, don't forget what he has done according to those

witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat.

MR. MALONEY: Your Honor, that's about the fifth time that he has commented he wished someone would shoot this man or that he would kill himself. I wish the Court would instruct Mr. McDaniel to stick with what little evidence he has.

MR. McDANIEL: You don't have any evidence yourself, Mr. Maloney.

THE COURT: All right, gentlemen. Proceed with your argument. Objection will be overruled. Go ahead, sir.

MR. McDANIEL: There was a statement made by Mrs. Turman that I want to comment upon. That was, she said, Darden made the statement your husband owes me something. Mrs. Turman said she didn't know what it meant. I don't know what it means either, but I have an idea what that little statement meant.

I don't think it had anything to do with the bill, either. Mr. Goodwill is going to argue something about—let me state this: Mr. Weatherford testified about this, or Mr. Brady, that this accident—there was people milling around, numerous people around the scene of the accident, you know what I mean. People say things and do things that later no way you can find out.

Mr. Weatherford made a statement that someone said they saw Mr. Darden throwing something, the gun. Mr. Goodwill will say, where is the witness? Well, I guarantee you if we had one, he would be here. But why was all the policemen out there searching that day?

Mr. Maloney, talking about Mrs. Turman's testimony under pressure, he even said one time she was under pressure at the preliminary hearing in the courtroom, that he was the only black in the courtroom. Well, that's Mr. Maloney's testimony now, and not Mrs. Turman, that he was the only black man in the courtroom. Remember that.

But Mr. Goodwill turned to Mr. Maloney, now, after four or five months, was that man in the courtroom?

That man? Yes, sir, he was. No, I don't agree with Mr. Maloney that nothing I say is important. Maybe it's not, but I hope so.

I'm going to ask you, in closing, that you consider the direct evidence, the direct evidence, and as Mr. Maloney said, it's good evidence, the best evidence, the direct evidence, the eyewitness considered as circumstantial evidence, surrounding that wreck, the time, the place, his color, clothes, the gun, where he went, leaving the scene of an accident, and put them all together and don't turn this man loose. I cannot help but wish that the Division of Corrections was sitting in the chair with him. Thank you.

THE COURT: All right.

* * *

[VIII; 782-819]

[CLOSING ARGUMENT FOR PETITIONER: MR. GOODWILL]

MR. GOODWILL: May it please the Court. The closing argument originally has not been planned to be long. We have all been at this a long time. I am sure we are all tired.

But in view of some of the things that Mr. McDaniel said, in view of some of the things that Mr. White said, perhaps more importantly, the way that they were said, the manner in which they were expressed to you, I feel an absolute obligation to cover these things. I don't want to be long-winded about it, but I believe as the Judge told you at the beginning of this, the purpose in our getting up here is to try and help you, not harangue you, not try you, and this is the impression that I got from the State's closing argument.

They're looking at you people and they're trying you. You know, what's the necessity in yelling? Were they talking to you, with you, or at you? One of the first things that Mr. White said was that it didn't matter, he didn't care what the Sheriff's Office had done.

Well, at the beginning of the trial, when we were picking you, the Jury, some of the things that were inquired into were reasonable doubt, would you require the State to prove the Defendant's guilt beyond and to the exclusion of every reasonable doubt.

He will instruct you that this must be done by clear and convincing evidence. For this reason, it becomes important what the Sheriff's Office did or did not do. Mr. Maloney talked to you about lack of evidence. This crime was committed on September 8th, 1973, over four months.

You heard or could assume from the testimony of the police officers, that the investigation started immediately. They were on the scene right away. They have had the opportunity and a little over four months to bring you tangible, concrete things that you can look at that can remove any questions.

By the Sheriff's Office, yes. And for that same reason, I try the prosecution because I believe that you people are sitting there, and a week ago you probably

never figured you would even be on a Jury, and in the second place, you knew absolutely nothing about this case.

Now, we have talked about burden and who had the burden, and the burden is on the State. The burden was to give you everything that they could possibly give you to remove from your minds any question of reasonable doubt that this was the man that committed the crime that he was charged with.

It's not a time to hold back evidence. If they have got it and it can help you, you want to have it. There are several things I will mention that all I can pose is the question, why didn't they? Why didn't they give you this?

I do agree with Mr. White in one respect. That the Sheriff's Department may not be on trial. I only accuse, I'm not saying they're on trial. But the quantum and the quality and the sufficiency of the evidence that these men present to you, that is on trial. That's what we're here for.

As expected, I knew Mr. White or, while on that line, sitting there and hearing Mr. McDaniel, I wondered if he had read my notes about my closing statement. He kept making the statement he is going to tell you this and he is going to tell you that.

And that's not important. What I tell you is important only if it helps you in reaching a decision, that's all. They have, by closing argument, in my estimation, tried to convict that Defendant, not on the basis of the evidence, but on the basis of argument, argument.

Mr. Maloney went through the evidence, the lack of it, the total lack of it; there is more that I will mention to you. But this was a parade of the horrors. The picture is terrible, you know. The gun, to some people, is a fearful thing. Seeing a widow on the stand is hard.

Hearing a young boy, 16 years old at the time this thing happened to him, testifying, that's hard. But you have got to separate what is fact, from the attempt to make it sound so lurid, so horrible, that because of that reason and that reason alone, you must convict this man.

That's why I say I got the impression that they were putting you on trial. And you're not on trial. These things you will take back, and you will examine them. There's no question they are bad. The picture appalls me too. But, has the Court found, when the State introduced it, it was something that should be introduced and should be shown to you. It's part of the State's case. So don't be led astray by the viciousness, the horrible nature and the testimony, not as it relates to the facts, but just isn't it a shame that this woman had to come into the courtroom and say, again, what she said before?

As I said, the Judge will instruct you that from the evidence and from the evidence alone, you must make you decision, and it's all you can consider, is the evidence.

Let's get one thing out of the way right off the bat. I think during this trial. I heard five different colors of that car described. Why didn't the State show you the car? You could have determined whether it was green, as one witness said, or black, as Mrs. Turman said, or antique gold, as the Defendant said. Why didn't they show you the car? This might have helped, I don't know. There may have been a question in your mind, and it may have resolved the question about something, I don't know why. I don't believe it is reasonable. Perhaps and, of course, this is within your province and not mine, to depict a man chasing this boy for some distance down the road, as you saw in the picture, with his belt unbuckled and his zipper unzipped.

Believe me, I don't mean to be ludicrous, but I believe his pants would fall down. I think it would be very difficult. It's for you to decide.

Phillip got shot in the face from two or three feet by a .38 weapon, which I think we all know is a fairly powerful gun. What did it do to him when he got hit? Did he stand there and take a .38 slug in the mouth and just continue looking? The impact from that distance of a bullet of that size has tremendous force. It's going to tear whichever way it hits. Has he testified he was kneeling down? I'm surprised it didn't knock

him down. You saw him, he was a good, sturdy boy, a good-sized boy. I think that's probably the part that helped, was his sized opposed to the bullet size.

But that's the first one. And then that's followed with a second, and then he says, from the first time he saw the man and Mrs. Turman in the store, to the time that he turned and ran, I believe this is his testimony, was 25 seconds. I believe that was his testimony.

Again, this is within your province. He also told you that his prime concern was Mr. Turman laying there. He also told you that at one point his mind went blank. Now, this is one reason we are asking, where we are questioning the identification. No, I don't think the kid was lying. I think he is making an honest attempt to identify the man he believes to be the one, but I will get into identification in a minute.

Mr. McDaniel told you I would, and of course I'm going to get into it. But remember those facts, 25 seconds total time elapsed during that period of time, he gets two slugs in the face. He is leaning over Mr. Turman looking down, and he's really not paying attention to what's going on inside. I am sure his mind went blank, and at that time, that's when he made his identification.

Now, he made a point of the fact that this man has done everything in the world to change his appearance. Well, I don't believe he has. He has not grown a full beard, for example. He could have shaved his head, all sorts of things he could have done that would change his appearance. The one thing that did come out that he testified he didn't look the same as he looked that day, and they said how is it different?

Okay, that creates a problem. They are identifying him positively as the man who did it, and yet he doesn't look the way he did that day. So, how can they say, unless they are mistaken, that that's the man.

The State doesn't want to talk about what they don't have. They didn't, they talked about the little bit of evidence they did have and then Mr. McDaniel made an impassioned plea to how many times did he repeat? I wish you had been shot, I wish they had blown his face

away. My God, I get the impression he would like to be the man that stands there and pulls the switch on him.

I don't care whether the State wants to talk about what they don't have or what they do have, but if they have got something they haven't shown to you, then they have failed to provide you with adequate information that you need to make a decision of this magnitude.

We're not talking about petty larceny. We started this thing out knowing it was a serious crime, a crime which the man could receive the electric chair for. We all knew this. And I don't think there has been any levity on my part, on Mr. Maloney's part, on Mr. Darden's part, this is serious business. The description given by Mrs. Turman and the description given by Phillip immediately after which I inquired about, is different. It's different. She said he was about her height, Phillip said he was a big, tall man. He's a little shorter than he is. I think he said he was six two. So we have got, although they both come into the courtroom and point him out, we have got a disparity between their own testimony.

I will mention the question that I know is going through your minds, but I won't answer it right now. I will before I finish. How could they both be mistaken, or how could they be telling the truth, and how could this man be telling the truth? How do you match them up?

As we go through my comments, remember these little distinctions about the identification. There is such a thing as mistaken identification and if we have a question involving the mistaken identity, I think it makes it incumbent upon the State to give you anything that's helpful, again. They didn't do it.

I think Mr. White misquoted, I'm sure not deliberately, although it does become important from the standpoint of tangible evidence that you could look at, and that is who took the money out, and I believe the testimony was Mrs. Turman said that the assailant told her to open the cash drawer and take the money out, and give it to him.

This becomes relevant when we think about Mr. Brady's testimony about dusting. Mr. McDaniel raised in your mind the fact that Willie got lucky on Phillip Arnold and he didn't kill him, and we all know what happened to Mrs. Turman. Although she was never threatened.

He never threatened to kill her, before or after, she testified to that. So, I guess he is raising the presumption that what if they were all dead. Well, let me ask you this question: What if they were all dead? Has the State produced to make this man the man that did it, what evidence has the State produced, if those people were all dead?

Mr. McDaniel asked you to do certain things. I, of course, ask you to acquit my client. That's no big surprise, but I ask you another thing, and that is, through being harangued and yelled at, and had a man storm around the courtroom and slap the paper and be demonstrative, don't let him embarrass you into a verdict. Reach the verdict on the evidence.

Mr. McDaniel got up here and he really didn't talk too much evidence, he talked about how horrible it was and all of this. Then he proceeded to try the Division of Corrections. He tries Mr. Darden's girl friend who, by the way, the State could have also produced, she was along on that trip. He tries Mr. Maloney, and I think he was getting awfully close to trying me.

Well, we're only in this courtroom for one purpose, and that is to try the guilt or innocence of this man sitting at this table. What the Division of Corrections may or may not do or what I agree or disagree with their policies, or whether Mr. McDaniel agrees or disagrees with their policies, we're not here for that. You do that another time if that's an important issue.

Mr. Darden explained to you how he was furloughed, how you get out on furlough. What the requirements were, how you built up over a period of time, maybe, just maybe, when they called and found out who this car that belonged to a possible suspect, although the description that was given by Mrs. Turman to Officer Neil—possibly when they found out that this man was on furlough, the police called it quits and stopped.

I think we have an excellent example here of one of two things, either the State is withholding evidence from you, or the police fell into a trap which possibly is understandable after you have been in law enforcement for a period of time.

This circumstance is a man on furlough, bam, we have got him. He is black and he generally meets the description. And then they stop. Mr. Maloney said the State was asking for this man's death. Mr. McDaniel gets up first and says that he is not asking for death, and then goes on for 30 minutes telling—well, he told you this for sure, said after the trial was over, if you found him guilty and that's the only thing we're talking about at this point, is the guilt or innocence, by golly, he was going to ask for death.

In my cross-examination of Mrs. Turman, you will recall it was not vindictive, it was not attacking, but we discussed statements that she had given to the officers immediately after the event occurred and the deposition. The fine discrepancies. I never asked her if she was positive this was the man, I never asked her that question. The State asked her, but I never asked her.

The woman had been through enough, but she had identified him, and therefore, it was necessary to go through these things. I would suspect the statement made immediately after she says she was not in shock, although if you take the shock theory, you know, one or two ways. She was in shock and possibly her identification was bad. If she wasn't in shock, she gave a good statement and her statements doesn't match with this man.

Let me pose a question. Mr. Darden was on the stand yesterday. He took the stand and he didn't have to take the stand. The Defendant does not have to take the stand. We put him on the stand, we admitted he was in Avon Park. We admitted he had been convicted of a crime. We admitted he was on furlough. We admitted he was in an accident.

I know of nothing that we tried to keep from you, from Mr. Darden. Now if there was anything that he said that was untrue, he named names, names that have

been available to the State, and why didn't they have those witnesses in here to testify that it wasn't true?

His testimony stands as far as what he said happened that day with himself, uncontradicted. Now, those are some of the witnesses I think the State should have brought in and let you listen to. If I were prosecuting, I would have. If I have a man that said I went to a lady's house and my car broke down and she calls the place for me and calls another place for me and names the name—

MR. WHITE: Your Honor, the State is now going to object to this. Mr. Goodwill has just told the Jury that we had access to names that came from Mr. Darden's mouth.

THE COURT: No, sir, that wasn't what he stated.

MR. GOODWILL: I did not say from Mr. Darden's mouth.

THE COURT: I will overrule the objection.

Go ahead.

MR. WHITE: He stated, as I recall, maybe I misunderstood him. I understood him to say the testimony came from the stand.

MR. McDANIEL: I believe he said Mr. Darden, if you will read back. Have the court reporter read back. He said it came from Mr. Darden's testimony.

THE COURT: That's what he stated, that it came from the stand and the Jury heard the witness, and they can judge what he said is true or not. So he is not going outside the evidence. The objection will be overruled. You may continue.

MR. GOODWILL: Mr. Darden got up there and he named names. I was interrupted—we were talking about the first lady, made the phone call for him, to get the car fixed. That's an easy fact to prove or disprove. Did he come back over with the wrecker? Easy fact to prove or disprove.

If we assume for a minute that he did, in fact, come back over, is it reasonable to believe that a man that committed these heinous offenses would come right back to the spot, not by himself, but with a wrecker and two other people, to the very spot that night.

The wrecker driver could have been here, the girl friend could have been here, the other man that he named could have been here. They could have testified, for example, whether or not Mr. Darden went over there and looked around in the bushes for a gun.

Now, if this was, in fact, his gun, he had thrown it in the bushes, isn't it a reasonable thing that if he was going back over there, he was going back over to get that gun? Where is the witness that saw him throw it? They just passed that one off. They're investigating a homicide, a shooting of a young boy and a robbery. It's so important that the chief ID officer, instead of sitting at the scene of the crime and gathering some things that could be presented to you, had to leave there and go down to the other place.

If you recall, we told you that he was in the car. The State didn't even produce any evidence to show that he was in the car. We admit it. He had an accident. There is absolutely no question about it. These are witnesses that I think you should have had the opportunity to hear.

If, in fact, their testimony was opposite from what Mr. Darden testified to and the Judge will instruct you on the weight and the credibility to give witnesses, but you have a right to believe or disbelieve him, just as much as any other witness.

The preliminary hearing of Mrs. Turman, we went into that. You heard me ask her about this man, identified them, et cetera, et cetera. I ask you to look around this courtroom. How many blacks do you see in it? How many blacks do you see at Defense table? It goes to her credibility because by her testimony, that was the first time she had seen him. Now, is her testimony in this trial based on the man she saw on the day of the offense or, is it based on the fact that she saw this man at a preliminary hearing in a similar situation?

Let's go back to the cross-examination of Mr. Darden for a minute. You didn't see the yelling and screaming and righteous indignation and get up and blow your face off. You didn't see that then. You saw him lead him through the store and the man told the story as best he could tell it. You heard, well give me your best estimate. He did. He did.

Why no righteous indignation at that point? If the man felt that strongly about it, how could he even get up there and examine him? But you saw him stand right over here in this courtroom, and this podium was right over here, and he just coolly and calmly went through it. Thought he had him on the wedding invitation, didn't he? Could I see that? Took it back and boy, he examined it all over, and you notice he didn't say anything more about it? He slipped it right back up there and he gave it to Mr. Darden, because Mr. Darden had told the truth.

Why, when you have the Defendant on the stand and the opportunity to put him through the most serious, grueling cross-examination with the intent of breaking him down, you didn't see righteous indignation. You didn't see the yelling and the screaming and the pushing and the shoving and the hitting with the stick and the whole works.

Well, the possibility is that he was telling the truth and the State didn't have anything at all to disprove it. If they had something to disprove that statement it would have been on that stand, and you did not hear it.

And then we come in here today and we went back to what I said earlier. He tries to win you or embarrass you into a decision based on his argument, but not based on what came from that stand, and that will be one instruction that I want you to listen to very carefully that the Judge gives you. I think he instructed you briefly on on it at the beginning of trial, right up here, that's what you have got to pay attention to, and the evidence or lack of evidence, you can consider.

Mr. McDaniel made a big point about Mr. Darden crying on the stand. Well, he was upset. I haven't cried about the death of Mr. Turman, the shooting at the boy, I don't know them. I didn't know them. There was not reason for me to cry. Mr. McDaniel says why didn't he cry when this widow was testifying about all of this? I would suggest to you the same thing. He didn't do it and he didn't know them.

The point he broke down on when he started crying was the parole. None of you have been incarcerated, in

the same fashion, or you wouldn't be sitting on this Jury, and I think if I was a week away from parole, I'd probably be a little upset myself. Jails aren't nice places, so I think this. I don't know what point he was trying to prove by it, that's the point that I am making to you. I don't know what point he was trying to prove.

Again, I guess he appealed to your emotions, what I have referred to as a parade of the horrors. I have talked to this woman before, I talked to this boy before. You know it because you heard me ask questions about a deposition, and I took both of them. There is no question it was bad, it was horrible. It's unfortunate that the boy will have to go through life this way, it's unfortunate that she lost her husband in that fashion, but that's not evidence. That's an appeal to your sympathy.

Then get down to the issue of crime, I think you will recall that Mrs. Turman didn't cry either. An innocent man doesn't need an alibi any more than I need one or Mr. McDaniel needs one.

He said he couldn't put on, and so and so and so and so and so and so. And that's exactly right. I have difficulty myself. Ask me a question, where were you on a certain day and I don't know. Maybe I could tell you, but an innocent man doesn't need an alibi and there are times in everyone's life when they are somewhere where no one knows where they are. I have often thought under the right circumstances how you could take anyone, if you followed their patterns for a period of time, and put them in a position where they couldn't say where they were if something were directed in their direction, if it looked like they committed a crime.

Mr. McDaniel said this man didn't make a phone call. He asked about phone calls, phone call, phone call, phone call. I still don't know what he was getting at. Today the big secret comes out, he didn't call. But you all correct me if I am wrong, but I believe the testimony of Mr. Darden was he called from the filling station and the line was busy.

Did you hear Don Neil mention a request for a lie detector test? In fact, I don't know what they put him on the stand for. He got up there and I don't even re-

member the questions that were asked him, he was up there such a short period of time, came in, Don Neil so and so, and so and so, and he was gone. I wish they had left him on there a little longer, because if you recall, Don Neil was the one Mrs. Turman gave the statement to. He was investigating officer, and he could have told us what she said to him at that time, what her state of mind was, what her condition was, as far as the ability to recollect facts. They didn't do that. Slipped him in and slipped him out. Mr. Darden didn't call the radio operator, or why didn't the State produce the radio operator or the logs that they keep? They keep some kind of records. I assume that's true. If it wasn't true, they should have shown that it wasn't true.

Remember, theirs is the burden, not ours. We have no burden. We don't have to prove innocence, it's their burden. And after this trial, if you have a reasonable doubt for any reason, but if you have a reasonable doubt because there weren't witnesses put on the stand that should have been put on the stand, then that's a reasonable doubt, and it is just as valid and the reasonable doubt falls under the definition, as the Court will give it to you, as any other reasonable doubt.

Again, Mr. McDaniel tried to imply that I was trying to imply these people were liars about the cars. I was a little confused, because I heard so many colors, Again, why didn't they produce the car? Mr. McDaniel said the gun wasn't in the water very long. You heard testimony that, and I don't know how long that gun was in the water, the gun was submerged without air and it rusts. But because of the excellent police work of the Polk County Sheriff's Department, they don't take the remaining bullet, they don't fire it right then. I can't believe these men are stupid, but when you take a gun out of water, if you don't oil it or do something, it is going to get rusty, and the FBI man here said on the stand that the reason he could not determine conclusively the bullet came from the gun was because the barrel was rusty, in a rusty condition.

But what evidence would there be if Officer Weatherford, as I asked him, fired that other bullet right out of

that gun right then as fast as possible. I believe I asked him wouldn't that give you the best sample for identification of another bullet. He said yes. There is no attempt to fingerprint the gun. They are thoroughly convinced in their minds that this is the murder weapon, and they treat it like it wasn't important.

They have the facilities for fingerprints, they testified they did, and they had facilities for ballistics. And there are things that could have been done to preserve the condition of this gun so as a good sample could have been made? Yes. If you can come in, and if that FBI expert, their witness, had come in here and said, yes, unequivocally this bullet was fired from this gun, there would be no doubt. He didn't say that. It's quite the opposite.

I want you to examine this gun when you take it back. It's an interesting—it has writing all over it. I don't know, those of you who are familiar with guns, but look at it when you go back and notice the fact that up at the top, United States property, right across here. Excuse me, I don't mean to be pointing this thing at you.

JUROR: No, I was just changing positions was all.

MR. GOODWILL: Right across the top is United States property, Massachusetts, December 29, .38 special BRD. Those of you who are familiar with guns, this isn't just a normal gun, this is some things on there that a police officer ought to look at. I know if I had, well, this is the first one I have ever seen and I am interested in what all of the writing on here is all about.

Of course, we heard the history of the gun; we heard there was a lot of them around; and I think he said we would probably find there were a lot of them in closets that were sold before the Omnibus Act, a lot of these guns and he has examined, I can't remember whether he said hundreds or thousands of these he has examined. No one was shocked more than I was when he testified that this gun was used in an assassination. I thought he said the assassination of President Kennedy, but I don't remember what he said. You remember what he said about it. This is the gun has got

some things about it that should have been looked into. In my handling it, I've got fingerprints all over it, and as you handle it, look at it, and there's fingerprints all over it.

Ballistically, the gun cannot be tied to the killing. Fingerprintwise, it cannot be tied to anybody. The sum total of the testimony about this gun is that it cannot be identified as being related to this man in any way, except that it was found where it was found, across the street from a bar.

Let's talk about that for a minute. I believe Officer Weatherford, on my examination, testified to at least two ways that gun could have gotten there. Again, I bring up the fact, well, we heard somebody told us he had thrown a gun. Well, everybody rushed down there. The statements taken, isn't that important? Wouldn't it have been nice to hear from this stand for you edification so that you could reach a decision, I was there, I saw this man, and he took a gun, and I saw him throw it back there in the bushes. Unbelievable. This can be taken for whatever value that you want. Certainly it looks incriminating. It seems to indicate that it was the murder weapon. But even with this, you can't put this with that man. You can't do it. This is right across the street from a bar, from a lounge; Officer Weatherford, when I asked him about footprints, remember he said, no, there was no way of getting footprints. There were people all over there. The killer of Mr. Turman and the robber of Mrs. Turman, and the person that shot Phillip Arnold could have been standing there right then. Is there any testimony were there any other blacks around the area? Was there any testimony about, did you take statements from any of the witnesses to the accident except Mr. Stone and Mr. Maloney said Mr. Stone says, yeah, this is the guy and he's got a moustache. He had a moustache then.

Phillip Arnold said the man was clean-shaven, didn't have hair on his face. Mr. McDaniel says the first thing I look at is his shirt. Mr. Stone, someone looked at a

moustache, and it wasn't on my questioning, on the State's questioning.

Again, we have the question of identity. The State called Mary Simmons to the stand. She promptly got up there and this guy, this guy did it, he was in a wreck. Carried him to a filling station, he discussed getting a wrecker, got out of the car and talked to the man at the filling station. You heard his explanation of what happened at the filling station, and then they went on to Tampa and got a wrecker.

Their witness gets up there and corroborates what the Defendant later says. Now, they imply that he sat there and listened to the testimony all of the days. So what if he heard that? She corroborated what he testified to. There has been nothing shown to prove that what he said he did on that day was not true, not one scintilla, not in the slightest piece. All of it could have been checked out. All of it could have been brought before you, any lies, any discrepancies. Do you realize there wasn't any testimony, direct testimony as to the exact time of the accident from any police officers, from any investigating officer, from the Hillsborough County Sheriff's or the Florida Highway Patrol? None of that. I am telling you, you find the wrecked car, check it, in the meantime he is going back and forth, he is on furlough, bam, that's our man. And at that point it stopped.

Do each and every one of you remember Mrs. Turman describing how long the gun was? I believe she said it was about this long. The State asked her and I asked her and she said the same thing.

Identification. Assuming this was the murder weapon; if she missed on that, she could miss on other things. I realize this is being somewhat lengthy, and I apologize. I assure you I will try to hurry it as much as possible.

There are a few points of evidence that I would like for you to consider. An hysterical woman, a 25-second mind blank, that's your eyewitness ID. No paraffin test. I can't blame the Polk County Sheriff's Department for that. That could have been done over in Hillsborough County. That could have been done. No fingerprint. Al

Brady testified that he did not even talk to Don Neil, who was the investigating officer, and he is the man who took the statement from Mrs. Turman. I don't know what in the world they were thinking of that day.

Mr. McDaniel was trying to emphasize the seriousness of it and I would like to emphasize the seriousness of it. You have a man dead and a boy shot and a woman assaulted and robbed, and he is more concerned about going down the street to a possible suspect car instead of staying there at the scene. It was raining. He testified he knew or he should have known after 16 years as an ID officer that things that we could have seen in this courtroom were going to be destroyed by the rain, tire tracks, footprints, possible fingerprints on the outside of the door. She testified he reached up and pulled down the door. Was it dusted? No. Were any of the doors dusted? No. I asked him were any of the doorknobs dusted? No. Nothing was dusted. And think about that a moment. He said it was the not type of surface that was conducive to getting a fingerprint off of. I think you could safely assume that if he was an expert with 16 years experience, he ought to know something and he ought to know whether or not it's going to take. That even seems like a futile act. Stoves, he looked at stoves. This man was supposedly buying \$600 worth of furniture. She didn't watch him the whole time he was in the store. Stoves, porcelain, refrigerator, oven doors, chrome that runs across the top of an oven door.

When I buy a stove, the first thing I do is open the oven. Fingerprints, solid, conclusive evidence. That's what has not been given to you. Mr. Brady also didn't say anything, that he found anything down at the site except the car. He didn't testify about any fingerprints on the car, and I suppose at that point, if we hadn't gotten up and admitted that the man was in the car, you wouldn't have had it.

We had to tell you that he was there. They failed miserably. No blood test, no lineup. Where is the shirt? No ID by the FBI on the gun. The question of time, on what time this even happened. The question of time by

Mr. Stone on what time he accident happened, 5:30 to 6:30, somewhere. Was the accident reported? If it was reported, we might have some testimony from the stand as to what time it was reported.

And that would narrow it, wouldn't it? That would tell us what time the accident was. You didn't hear from the officers, the original officers that responded. If there was one, you don't know that. Why not? What time was he dispatched? What time did he get there? It's a matter of record. They keep records of this. You don't have it. You don't even have a complete chain of custody of what has happened to this gun.

Weatherford gave it to Keeny and then, at some time later, Keeny gave it to Cunningham. Did you hear from Chuck Keeny? Was he on the stand? Did he testify about the gun. Did he say anything about it? Why not?

There is one thing I agree with, with Mr. McDaniel on, probably the only thing. This crime was committed by an animal. He had to be. You have observed the Defendant all of the days of trial, you heard his testimony. Unfortunately, it becomes your job to determine whether or not he was an animal.

Premeditation, the man that did it, whoever he was, well, Mrs. Turman said, it was instantaneous. That she started to say something to her husband and before the words even got out of her mouth.

You will get an instruction on premeditation. We feel, Mr. Maloney and myself, Mr. Darden, have tried to give you everything we had. We didn't hide anything. We didn't hide the man's prison record, we didn't hide anything. We gave it to you like it was, and there was absolutely no attempt except by what I, perhaps, considered to be a rather poor attempt at cross-examination of the Defendant. And Mr. McDaniel had the opportunity, if he wanted to prove to you, that Mr. Darden was an animal, was a liar, was the man that committed this crime, he had the opportunity. There was no time limit placed on him. He could still have him on there.

In closing, let me say this to you: That you will receive an instruction that states in effect that the State

is required to prove each material allegation of the indictment beyond and to the exclusion of every reasonable doubt before you can find this man guilty. Beyond and to the exclusion, if there is one thing we can all thank God for in this country, it's the fact that that right there, those words, have to go to a Jury of our peers, if we are tried in a Court of law, puts the burden on the State to prove it. No burden on us. In spite of this, we told you what we could.

Right after that instruction, you will be told by the Judge that it is to the evidence, the words, the pictures, the whole works, the evidence, and to it alone that you are to look for the proof. You can't prove him guilty on what Mr. McDaniel says, and by the same token, you can't find him innocent on what I say.

Right there. There it is. You consider it carefully. I think this case is rampant with reasonable doubt. It runs through it from the beginning to the end. Of course, it goes without saying that there is, as Mr. McDaniel got up here and wished all sorts of horrible things on my client, and asked you to find him guilty, I, of course, ask you to find him not guilty. But only on this, nothing else. This, and this man's testimony.

I appreciate your attentiveness, I know it's been hard to sit and listen. I find myself sometimes, no matter how interesting the conversation may be, there ain't no way you're going to keep me awake. But, in a matter of this—as great as this—I can truthfully say to you, that I think that each of you jurors have honestly and fairly listened and looked and observed the evidence. And this is all the Defendant in a criminal case can ask for, and I thank you for it. Thank you very much.

* * * *

[II; 209-210]

IN THE
IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN AND FOR
CITRUS COUNTY, FLORIDA

Case No. GF 73-2027 C
Murder in the First Degree

STATE OF FLORIDA

vs

WILLIE JASPER DARDEN

JUDGMENT AND SENTENCE

WILLIE JASPER DARDEN, you were charged by an indictment duly found by the Grand Jury of Polk County and duly presented in the Circuit Court of Polk County with the crime of murder in the first degree, to which crime you entered a plea of Not Guilty. A change of venue was granted and this cause was transferred to this Court for trial. A jury of twelve citizens, duly impaneled to try you upon the charge of the indictment, after having heard all evidence in the case, the argument of counsel and charges and instructions of the Court, have rendered a verdict against you, finding you guilty of the crime of murder in the first degree as charged in the indictment, and, upon completion of the second or sentencing procedures of the trial, a majority of such jurors recommended that a death sentence be imposed upon you.

The Court has heretofore and does now again adjudge you to be guilty of the crime of murder in the first degree, as charged in the indictment. Now, you being before the Court, attended by your counsel, do you have any cause to say why the judgment and sentence of this Court should not be pronounced upon you?

No legal cause being shown in bar hereof, and the Court having determined that sufficient aggravating circumstances, as defined by Section 921.14 of the Florida

Statutes exist, and that insufficient mitigating circumstances exist to outweigh them, it is the Judgment of the Court and the sentence of the law that you, WILLIE JASPER DARDEN, for the crime for which you stand convicted, be delivered by the Sheriff of Citrus County, Florida, to the proper officer of the State Penitentiary of Florida, and by them safely confined until such day and time as the Governor of Florida, by his warrant may appoint, at which time by said warrant directed and within the chamber provided by law, you, WILLIE JASPER DARDEN be, by the proper officer provided by the Warden of said Prison, electrocuted until you be dead, and

May God have mercy on your soul.

DONE AND ORDERED in Inverness, Citrus County, Florida, this 23rd day of January, A.D., 1974.

/s/ John H. Dewell
JOHN H. DEWELL
Circuit Judge

[OPINION OF THE SUPREME COURT OF FLORIDA]

SUPREME COURT OF FLORIDA

Nos. 45056, 45108

WILLIE JASPER DARDEN, APPELLANT

v.

STATE OF FLORIDA, APPELLEE

Feb. 18, 1976

Rehearing Denied April 19, 1976

BOYD, Justice.

Pursuant to Article V, Section 3(b)(1), Florida Constitution, this Court takes jurisdiction over a direct appeal from a final judgment imposing the death penalty.

Carl's Furniture Store in Lakeland, Florida was robbed on September 8, 1973. During the course of the robbery, the proprietor, Carl Turman, was shot and killed and a neighbor boy, Phillip Arnold, was wounded. Soon afterwards, the Appellant, Willie J. Darden, who was on furlough from the Division of Corrections, lost control of the borrowed automobile he was driving and smashed into a telephone pole some three miles from the site of the murder, assault and robbery. After returning to his girl friend's house in Tampa that night, the Appellant was arrested on a traffic charge, leaving the scene of an accident. Soon thereafter, he was arrested and charged with murder, assault with intent to commit murder, armed robbery, and assault with intent to commit rape. The grand jury returned indictments charging first degree murder, robbery, and assault with intent to commit murder in the first degree.

Both before and during trial, Mr. Darden was identified as the guilty party by Phillip Arnold and by Mrs. Helen Turman, the decedent's wife, who was present and

assaulted during the commission of the robbery and murder. The trial jury found the defendant guilty of murder in the first degree, assault with intent to commit murder in the first degree, and robbery. After the second phase of the bifurcated trial mandated by Florida Statutes Section 921.141, the jury recommended the imposition of the death penalty. After enumerating its findings of aggravating and mitigating circumstances as required by Section 921.141, the trial court sentenced the Appellant to death by electrocution.

Appellant alleges eight grounds for reversal. The racial composition of the venire, the exclusion of prospective jurors because of their expressed attitudes toward the death penalty, and the alleged unconstitutionality of the sentencing provisions of Florida States Section 921.141 provide three of these grounds. Another is the court's eliciting from a state witness a comment regarding other murder cases in which Darden was, at least initially, a suspect. The courtroom identifications of the defendant by Mrs. Turman and Phillip Arnold respectively, are alleged to be tainted by impermissibly suggestive pre-trial procedures and provide two more allegations of reversible error. A further ground is the allegedly erroneous admission into evidence of a gun asserted to have been used in the holdup and murder. Appellant's final point on appeal is that certain remarks made by assistant state attorneys during closing arguments were so prejudicial to Appellant's cause as to require the granting of a new trial.

We have reviewed all the points raised on appeal by the Appellant and conclude that only one merits consideration for reversal of the conviction below, i.e., whether statements made by the assistant state attorneys in closing argument were so inflammatory and abusive as to have deprived the Appellant of a fair trial. The law requires a new trial only in those cases in which it is reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt that it would have otherwise done or in which the comment is unfair.

It should be noted that the first denunciation of the criminal who committed the acts was by Appellant's own attorney, who made the following statement to the jury:

"I intend to just briefly summarize the evidence that has been before you. I'm going to attempt to be as objective as possible. The first witness that you aw was Mrs. Turman, who was a pathetic figure; who worked and struggled all of her life to build what little she had, the little furniture store; and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before here eyes, by what would have to be a *vicious animal*." (emphasis supplied)

The defense counsel was saying only that the person who committed the crimes was an animal, and he would have had the jury find that someone other than Appellant was the perpetrator of the criminal acts. Although Appellant further complains of the expression of his personal views by the Assistant State Attorney about Appellant, the defense counsel made the following statement which showed his personal reaction:

"But can you get the pistol back to Mr. Turman? Can you get the pistol back to Mr. Darden? No, we can't do that, but we got the pistol, and it's good enough for us. *It's not good enough for me. I wouldn't do what you're being asked to do on that, really, I wouldn't . . .*" (emphasis supplied)

The record shows the following remarks were made in the State Attorney's portion of the closing arguments:

"*. . . As far as I am concerned, and as [defense counsel] said as he identified this man, this person as an animal, this animal was on the public for one reason . . .*" (emphasis supplied)

"*. . . I am sure that I want you to remember [defense counsel's] opening statement, opening argument when he called this person an animal. Remember that, because I will guarantee you I will ask for*

the death. There is no question about it. (emphasis supplied)

"The second part of the trial I will request that you impose the death penalty. I will ask you to advise the Court to give him death. *That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it . . .*" (emphasis supplied)

* * *

"I don't know, he said on final argument I wouldn't lie, as God is my witness, as God is my witness, I wouldn't lie. *Well, let me tell you something: If I am ever ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until by teeth fall out.*" (emphasis supplied)

"What does he have to lose to lie? Nothing. Nothing . . ."

* * *

"Mr. Turman, not knowing anything happened, not knowing what was going on. *I wish he had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting here with no face, blown away by a shotgun, but he didn't. He had no gun. He had no chance. He didn't give it to him. With a gun in the woman's back about to attempt his lust, his greed, the poor man opened the door and he shoots him between the eyes. Between the eyes, isn't that enough? Not for Darden it's not enough. There's more*" (emphasis supplied)

* * *

"*. . . I wish someone had walked in the back door and blown his head off at that point.*" (emphasis supplied)

In light of the "animal" characterization by the defense, when the jury found Appellant guilty, the statements of prosecuting counsel that Appellant was an animal do not seem unduly inflammatory. It seems inappro-

priate to reverse the State's conviction because the prosecutor was making the same alleged errors as defense counsel.¹ A careful examination of the record leads this Court to conclude that, although the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility, in this particular case they amount to harmless error when the totality of the record is considered in these uniquely vicious crimes.

Let us briefly review the conduct condemned by the prosecutor. Appellant was a career criminal who admitted at least five convictions and who was on a weekend furlough from the state prison to visit his family when these felonies were committed. His family, including his wife, was out of the State, so Appellant stayed with another woman in Tampa. On the day of the crimes he took the woman to work and then used her car to visit various bars where he drank alcohol and gambled in a pool hall contrary to standards imposed by the condition of the furlough, even neglecting to pick up the woman when she left work.

Appellant said he was paid to drive an unidentified stranger named Roy to Lakeland, that he had car trouble, and that he was racing back to Tampa where he was supposed to be best man in a wedding. He admitted speeding in a rainstorm and creating great danger to other motorists when he wrecked the car on the same road taken by the killer according to witnesses. The wreck was near the murder scene and occurred about the same time as the crimes; furthermore, the car Appellant drove fit the description of the getaway vehicle used by the criminal after his crimes were committed. The pistol admitted into evidence was identified as probably being the death weapon and was of the same type; it was found the day after the killing, robbery and attempted murder only thirty-nine feet from where Appellant's car was wrecked. Four cartridges had been fired, the very same number fired at the scene of the crime.

¹ Cf. *Arline v. State*, 303 So.2d 37 (Fla. App. 1974).

The record shows that Appellant first robbed Mrs. Helen Turman and that, when her unarmed husband Carl started to enter the store, Appellant shot him between the eyes scattering blood and brains. As a sixteen year old boy, Phillip Arnold, tried to aid the wounded man, Appellant shot him in his mouth, neck, and side, leaving permanent injuries, including a bullet still in his neck at time of trial. While her bleeding husband lay in a rainstorm at the door. Appellant tried to force Mrs. Turman to commit an unnatural sex act upon him at gun point. She refused, and after shooting the boy Appellant left the area.

How is it possible to use language which is fair comment about these crimes without shocking the feelings of any normal person? The language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes. The law permits fair comment. This comment was fair.

When the work product of a criminal is a mortally wounded husband, a wife who is sexually assaulted and robbed, and a sixteen year old boy who is shot three times while trying to help the wounded man, there is little basis to complain of the State Attorneys' expression in reasonably describing what happened and what should be done to the guilty party.

There was overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges and a recommendation of a death sentence for first degree murder. There were absolutely no mitigating circumstances to reduce the penalty from death to life imprisonment.

While the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made, and, if there is ample basis in the record to support the remarks, a conviction will be affirmed.² Our review of the record convinces us that the remarks complained of were not sufficient to deprive Appellant of a

² *Collins v. State*, 180 So.2d 340 (Fla. 1965).

fair trial when the totality of the evidence is considered.³

Additionally, Appellant admits that his attorney voiced by a single objection to the prosecutor's closing arguments, that it was not directed to any of the allegedly inflammatory matter, and that his attorney waited until the fifth occasion to object at all. This Court has held that a prosecutor's challenged argument will be reviewed on appeal only when a timely objection is made.⁴

Accordingly, the judgments and sentences are affirmed.

It is so ordered.

ADKINS, C. J., ROBERTS and OVERTON, JJ., and FERRIS, Circuit Judge, concur.

SUNDBERG, J., dissents with an opinion, with which ENGLAND, J., concurs.

SUNDBERG, Justice (dissenting).

I dissent. Remarks made by the prosecutors during closing argument were so inflammatory and prejudicial that appellant should be afforded a new trial.

The fact that defense counsel characterized a person who would commit the offenses for which defendant was being tried as "an animal" did not excuse the prosecutor's subsequent, repeated personal descriptions of the defendant in this manner:

"... But let me tell you something. As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons. As far as I am concerned, and as Mr. Maloney said as he identified this man, this person as an animal, this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can we expect him to stay in a prison when they go there? Can't we expect them

³ *Sanders v. State*, 241 So.2d 430 (Fla. App. 1970); *Hamrick v. State*, 235 So.2d 360 (Fla. App. 1970), *cert. den.* 238 So.2d 421 (Fla.) *cert. den.* 400 U.S. 994, 91 S.Ct. 466, 27 L.Ed.2d 443.

⁴ *State v. Jones*, 204 So.2d 515 (Fla. 1967).

to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?

"Mr. Darden said, oh, I don't know, no, I can't know, it's all right to drink, it's all right to drink alcoholic beverages, except the last. Remember one comment he made? Unless, well, as long as they don't find out. Find out? He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.

"This man admitted that he is a prisoner, that he had a gun in his possession. He doesn't work, he is in the pool halls, he is in the bars, he is in the lounges. He is a prisoner, supposed to have been. He is not a prisoner. No, I wish that person or persons responsible for him being on the public was in the doorway instead of Mr. Turman. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of the boy.

"Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them. Turn them loose to visit his family, to visit his family, that turns out his family is a girl friend in Tampa, his family is in, I think he called her his sponsor, his sponsor...."

Perhaps the reference to a leash, although certainly inflammatory, was excusable as being evoked by two references in argument by appellant's counsel to the crimes being "the work of an animal"; however, I find no provocation by the defense for the balance of the prosecutor's above-quoted statements.

Another area of improper comment is exemplified by the following remarks:

"... The second part of the trial I will request that you impose the death penalty. I will ask you

to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose—this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes—not home, strike that, excuse me—go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend. . . .”

The precise implication in this and the foregoing excerpt is that the parole authorities and the Division of Corrections are being “soft on criminals” and the jury should remedy such situation by finding the appellant guilty on the first degree murder charge. This inserts a wholly immaterial issue into the proceedings which the jury could try rather than the defendant who was on trial; however, the defendant had to be the recipient of any verdict brought back by the jury.

Nor could the remarks of defense counsel be construed to serve as an invitation for the prosecutor's inflammatory expressions of regret that appellant had not been killed during his alleged commission of the crimes:

“ . . . Mr. Turman, not knowing anything happened, not knowing what was going on. I wish he had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting here with no face, blown away by a shotgun, but he didn't. He had no gun. He had no chance. He didn't give it to him. With a gun in the woman's back about to attempt his lust, his greed, the poor man opened the door and he shoots him between the eyes. Between the eyes, isn't that enough? Not for Darden it's not enough. There's more. . . .”

After describing further conduct surrounding the commission of the crimes the prosecutor expressed once

again concerning the appellant, “I wish someone had walked in the back door and blown his head off at that point.” Later,

“ . . . Okay. He's testified, Mr. Cunningham also testified that that cylinder turns to the left. As you fire the gun, pull the trigger, it turns to the left. I asked him to put the one marked in red—couldn't use a live one—under the hammer and pull the trigger. He did. When he was through pulling it five times, five times, because Darden shot Turman between the eyes; he clicked in the boy's face, that's number two; he fired in the boy's face is number three; he fired in the boy's neck, is number four; and he fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself.

* * * *

“ . . . And Mr. Darden saved one. Again, I wish he had used it on himself. . . .”

In asserting that the appellant had attempted to change his appearance subsequent to the date of the crimes the prosecutor concluded with the remark, “The only thing he hasn't done that I know of is cut his throat.”

At this juncture counsel for appellant objected:

“ . . . Your Honor, that's about the fifth time that he has commented he wished someone would shoot this man or that he would kill himself. . . .”

Upon which the trial court ruled:

“ . . . All right, gentlemen. Proceed with your argument. Objection will be overruled. Go ahead, sir. . . .”

In *Stewart v. State*, 51 So.2d 494 (Fla. 1951), Mr. Justice Terrell cautioned prosecutors to refrain from inflammatory and abusive argument, directing trial judges to restrain and rebuke counsel from engaging in such tactics. The reason for inhibiting such conduct was concisely stated by him in the following terms:

"... Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperment. . . ." (p.495)

The implication in the remarks by the prosecutor in that case was that if the defendant were not punished by the jury he would go on to commit a more serious and heinous crime. This can be equated with the argument of the prosecutor in the case at bar wherein he implies that unless the defendant is convicted on the first degree murder charge he will be set free "on the public".

Reference by the prosecution on repeated occasions to the defendant's conduct while on furlough directed the jury's attention to matters totally immaterial to the offenses charged, and it can be concluded that the only purpose of such references was to inflame and prejudice the jury in their deliberations upon the charges at issue. In *Gluck v. State*, 62 So.2d 71 (Fla.1952), the prosecutor, in the words of Justice Mathews, "hurled epithets at the accused so foul, vile, abusive and obscene as to be unquotable in this opinion". The trial judge refused to caution and admonish the state attorney that such conduct is highly irregular, as urged by the defense. Earlier in the rape prosecution, the prosecutor had referred to the accused's unemployment, family, religion, character, and had introduced detailed evidence respecting an alleged similar act, although the accused's identity and carnal knowledge of the prosecutrix were admitted. This court reversed the conviction and granted a new trial since the prosecution at issue was not "a fair and impartial trial". Rather than a fair commentary upon the evidence or reasonable inferences to be drawn therefrom, the above-quoted remarks by the prosecution in the case at bar can only be characterized as vituperative personal attacks upon the appellant and as appeals to passion and prejudice.

As was stated by this Court in *Collins v. State*, 180 So.2d 340 (Fla.1965):

"... The rule is clear against inflammatory and abusive argument—the problem is applying the rule to the particular facts at hand. The history of the legal profession is clear also in its love of florid arguments and dramatic perorations. The line between the inflammatory and the dramatic is not clear. . ."

Here that line has been crossed. Vigorous and diligent advocacy on the part of the state is not only commendable, but necessary to make our system of jurisprudence work. The strenuous advocacy by each of the parties to a criminal proceeding of the facts and evidence which best establish their respective positions provides the basis upon which the jury may synthesize all such facts and evidence to arrive at that most desired result in our system—the truth. However, appeals to passion and prejudice distort the system and must be condemned if our system is to function and endure.

Appellee asserts that timely objection to inflammatory argument must be made to preserve the point for appellate review. There has heretofore been quoted the objection made by the appellant's counsel to the remarks by the prosecution and the court's ruling thereon. I deem this sufficient to preserve the matter on appeal since it afforded the trial court the opportunity to at least attempt to cure the effects of the remarks. It is not clear at all, however, that it was even within the power of the trial court to disabuse the minds of the jurors of the cumulative effect of the patently inflammatory remarks of the prosecution even had it sustained the objections to the remarks and admonished the jury accordingly. The issue really is, did the appellant receive a fair trial in the atmosphere created by the prosecution's remarks. As pointed out by the court in *Wilson v. State*, 294 So.2d 327 (Fla.1974):

"The State points out that in some instances there was an absence of objection in the present trial and in other instances an objection to the improper in-

ferences was sustained. Such absence will not suffice where the comments or repeated references are so prejudicial to the defendant that neither rebuke nor retraction may entirely destroy their influence in attaining a fair trial." (pp. 328-329)

See also *Pait v. State*, 112 So.2d 380 (Fla.1959); *Oglesby v. State*, 156 Fla. 481, 23 So.2d 558 (1945); and *Knight v. State*, 316 So.2d 576 (Fla.App. 1st 1975). I conclude that the remarks set out herein were such that would unduly create, arouse and inflame the sympathy, prejudice and passions of the jury so as to effectively deprive the appellant of a fair trial. *Barnes v. State*, 58 So.2d 157 (Fla.1952).

It is appropriate to comment upon another category of remarks made by the prosecution in final argument. In expressing their personal beliefs concerning the guilt and lack of veracity of the defendant the prosecutors argued:

"... I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life. . . .

"... I don't know, he said on final argument I wouldn't lie, as God is my witness, as God is my witness, I wouldn't lie. Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out.

"What does he have to lose to lie? Nothing. Nothing. The only person who took that stand, Mr. Maloney said no one took that stand and lied under oath. He was wrong. One did. Sitting over there with a yellow shirt on with the stripe down the front at this time. . . ."

These statements clearly violate the letter and spirit of Section 5.8(b), American Bar Association Standards

for Criminal Justice and D.R. 7-106(C)(4), Code of Professional Responsibility. Such argument has been condemned by this Court long before the adoption of the cited Standards and Code. As stated in *Tyson v. State*, 87 Fla. 392, 100 So.254 (1924):

"It is generally understood that the expression by counsel in argument before the jury of personal opinion of guilt is not only bad form, but highly improper, as counsel is not a witness, nor under oath to speak the truth, not called as an expert to give his opinion. *Adams v. State*, 54 Fla. 1, 45 So.494."

To reiterate the standard of conduct expected of a representative of the State in the prosecution of a criminal trial as heretofore enunciated by several of our district courts of appeals:

"... It is the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled. His duty is not to obtain convictions but seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client. . . ."

Knight v. State, *supra*; *Cochran v. State*, 280 So. 2d 42 (Fla.App. 1st 1973); and *Kirk v. State*, 227 So.2d 40 (Fla.App. 4th 1969).

Yet the majority opinion suggests that this welter of highly prejudicial comment was fair, or if not exactly fair, then at least not so improper as to constitute reversible error "when the totality of the evidence is considered". In other words, any error underlying the conviction of the appellant must have been harmless. When one considers that Darden has been sentenced to die by the court which heard these arguments after recommendation of death by the jury to which they were made, it is evident that any assigned error should be

given very careful consideration before the harmless error doctrine is invoked. Obviously, resort to the doctrine in cases of capital punishment should be carefully limited.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), a California state prosecutor had commented upon defendants' failure to testify and the trial judge had charged the jury that defendants' silence could be used as the basis for adverse inferences. On appeal, the Supreme Court of California held that, while these comments at trial had denied defendants their constitutional rights, such error did not constitute a "miscarriage of justice" and was therefore harmless. The United States Supreme Court reversed the conviction, holding that in order for the denial of a federal constitutional right to be held harmless in a state criminal case, the reviewing court must be satisfied *beyond a reasonable doubt* that the error did not contribute to a defendant's conviction. The court further held that the burden of proving lack of harm rests on the State. *Id.* at 24, 87 S.Ct. at 828, 17 L.Ed.2d at 710.

Surely there is a federal constitutional right to a fair and impartial trial in the courts of this State. U.S.Const. Amends. VI, XIV. Recognizing that no defendant is entitled to a *perfect* trial, nonetheless, I am not satisfied that Darden's fundamental right to a *fair* trial was unharmed by the prosecution's improper commentary and believe that under the *Chapman* test this conviction cannot stand. The Florida cases cited heretofore also lead me to this conclusion.

Accordingly, I would vacate the judgment and sentence of death and remand this cause for a new trial.

ENGLAND, J., concurs.

SUPREME COURT OF THE UNITED STATES

No. 76-5382

WILLIE JASPER DARDEN, PETITIONER

v.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of Florida, Nos. 45056, 45108.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 1, 1976